The Sovereignty over Tokto islets

- In International Air Law Perspective -

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〈 Contents 〉

Ⅰ. Introduction

Japanese Foreign Minister, Yukihiko Ikeda, said on 9 February that Tokto is clearly a part of Japanese territory from the viewpoint of history and international law. Recently, the Japanese government announced that they will include Tokto in their territory when establishing a 200 - nautical - mile exclusive economic zone around its shores. This policy had not been accepted by the Korean Government.

Tokto consists of a group of two main islets and 32 other islets which

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is located at 37° 14′ 18″ N. and 131° 52′ 33″ E. between Korea and Japan. Tokto is 48.6 miles from Ulneungdo (a Korean island) and about 86 miles from Okinoshima. The Korean Government argued that the history of the Korean sovereignty over Tokto is from 512 A. D. in Shila dynasty. Tokto was once called Woosando or Sambondo, and is appeared in geographical descriptions compiled in Korea in the fifteenth or sixteenth century, but it is not clear whether the name means the present Tokto. In the Tongkook Yoji Sungnam(1531) mentions that the two islands of Woosando and Ulneungdo are situated in the sea due east of the Uljin County of Kangwon Province country, and that a passage in the Sejong Silnok (1476) relates that Kim Ja-Joo and his troupe could see Sambondo from Ulneungdo. But the Japanese Government is sceptical about the assertion that Woosando or Sambondo is Tokto, and argues that these islands are rather nothing but Ulneungdo.

The Japanese Government's claim was substantiated by various historical facts : since the latter half of the 14th Century, Japanese sailed to the Tokto island. They became a Japanese fishing ground by the end of the 16th Century. In the early part of the Maiji Era (1870's), the authorities of the Japanese Ministry of Foreign Affairs acted on full cognition of the territorial status of Tokto as a Japanese possession.

The Japanese Government in 1954 to bring the dispute before the International Court of Justice was not accepted by the Korean Government. But the Korean Government affirmed Tokto is part of a Korean territory and that sovereignty is not an issue of contention between Korea and Japan. We could find the Korean perspective for sovereignty of the Tokto islets from the address of the Korean Ambassor in Japan, he said, "We have our property in our pocket, we just have to keep our property no matter how many times Japan repeats its claim."

Under these circumstances, this article examines the sovereignty over Tokto aerospace in public international air law perspective. First, the

legal status of the Territorial Aerospace, Flight Information Region and Air Defense Identification Zone will be examined. Secondly, the Japanese State's practices will be examined to affirm that whether Japanese delegates had a legal cognition of the sovereignty over Tokto islets.

Ⅱ. The Legal Regime of the National Aerospace

1. The Territorial Aerospace

Article 1 of the Chicago Convention (1944) defines the sovereignty, "The Contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory." It is merely declaratory in nature and affirms a principle which seems to be generally recognized under customary international law. The words "complete" and "exclusive" clarify the fact that, contrary to the Law of the Sea. As far as territory is concerned, Art 2 determines that the lateral limit comprises the land regions and territorial waters adjacent to them over which a State exercises its sovereignty, suzerainty, protection or mandate.

With the development of aviation in the early years of the present century, and the impact of the World War, the customary law emerged in a relatively short period. To this factor may be added the desire to prevent aerial reconnaissance by potential enemies, a fear of surprise attack, and the economic value of granting the right to fly to foreign commercial agencies. Consequently, the air law does not permit a right of innocent passage, even through airspace over the territorial sea.[1)]

2. Airspace over Flight Information Region (FIR)

Contracting States shall determine, in accordance with the provisions of this Annex and for the territories over which they have jurisdiction, those portions of the airspace and those aerodromes where air traffic services will be provided. They shall thereafter arrange for such services

1) Ivan Brownlie, Public International Law, Clarendon Press, Oxford, 1990, at 119.

to be established and provided in accordance with the provisions of this Annex, except that, by mutual agreement, a State may delegate to another State the responsibility for establishing and providing air traffic services in flight information regions, control areas or control zones extending over the territories of the former.

The delineation of airspace wherein air traffic services are to be provided, should be related to the nature of the route structure and the need for efficient service rather than to national boundaries.[2)]

3. Legal Regime of the Air Defense Identification Zone (ADIZ)

1) International Court of Justice Art. 38 (1)(b)

ICJ Art. 38(1)(b) refers to "international custom, as evidence of a general practice accepted as law." What is clear is that the definition of custom comprises two distinct elements (1) "general practice" and (2) its acceptance as law. I would examine the legal regime of the ADIZ according to the ICJ art. 38(1)(b)

2) States' General Practices in the ADIZ

The traditional and still acknowledged general doctrine is that complete freedom prevails in the airspace above the high seas. By 1978 twelve States, Canada, Korea, Japan, Philippines, Iceland, Italy, and Taiwan, had established some form of the ADIZ.[3)] These are defined as areas of airspace over land or water in which identification, location and control of aircraft are required in the interests of national security. The pilot in command of a foreign aircraft cannot operate an aircraft into the United States without making position reports. The pilot in command before he

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2) 2.-9-1. Recommendation, International Standards and Recommended Practices Air Traffic Services, - Annex II. to the convention on International Civil Aviation, tenth edition - July 1994. ICAO.

3) Iswandi, P. The Rights and Duties of States in the airspace adjacent to their Coasts, Reflections on the U.N. Convention on the Law of the Sea, McGill Univ. 1985, at 87.

takes off from the place where the flight originates, must file a flight plan.[4]

The U.S. ADIZ were established December, 1950, during the Korean War ; The United States Federal Aviation Agency has published administrative regulations governing the operation of civil aircraft operating" in a defense area, or into, within, or out of the United States through an Air Defense Identification Zone (ADIZ)." ADIZ is are defined as "areas of airspace over land or water in which the ready identification; location and control of civil aircraft is required in the interest of national security."[5] In addition to the penalties otherwise provided for by the Civil Aeronautics Act of 1938, as amended, any person who knowingly or wilfully violates any provision prescribed in this part, or any order issued there under shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be subject to a fine of not exceeding $ 10,000 or to imprisonment not exceeding one year, or to both such fine and imprisonment.[6]

The Canadian Rules for the Security Control of Air Traffic have been declared "in the interest of national security; to identify, locate and control aircraft operated within areas designated as Canadian Air Defense Identification Zones."[7] As a violation clause, it defines; A violation of

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4) Riza Turmen, Freedom of Flight in the Airspace over the High Seas and Its Practical Aspects, Institute of Air and Space Law, McGill Univ. 1980, at 102.

5) Regulations of the Administrator, part 620, Effective January 15, 1953, Security Control of Air Traffic, Subpart §620.2 (b)
If the aircraft entered the North American Air Defense Identification Zone (ADIZ), the United States Air Forces fighters will scramble to intercept the unidentified aircraft. The unidentified aircraft's pilot will be asked to identify himself and his destination and it will be forced to land immediately. Furthermore, if there is no response the unauthorized intrusion aircraft will be fired across the nose of itself by the United States Air Forces fighters. In this scenario, we should consider what is the legal status of the ADIZ?

6) ibid. §620.18

7) 1.-1. Purpose, Rules for the Security Control of Air Traffic, effective date -1 May, 1954.

these rules will render the pilot of an aircraft liable to inflight interception by military interception aircraft.[8]

Japan established Japanese Air Defense Identification Zone in 1969. It is composed with inner JADIZ and outer JADIZ and Okinawa airspace was enclosed from May 1972.[9] Extension of the Seaward claims of the People's Republic of China, specifically including the airspace, occurred in 1958.[10] Although the People's Republic of China has not announced any zones of identification per se, the charts show this announcement, "Warning: Aircraft infringing upon Chinese territorial rights may be fired upon without warning."[11]

3) Acceptance as law : International Customary Law

① Opponent's opinion

However, the utility of the zones in performing the function on which they are supposedly based - national security - is open to serious question. When the first zones were established in 1950, the primary concern was massive strategic nuclear attack by long-range bombers. Today any such attack would come not from overflying aircraft but from ground-based intercontinental ballistic missiles, ballistic missile-firing submarines with missile ranges of up to 5000 miles, or aircraft standing several hundred miles out to sea and serving as launching platforms for long-range cruise missiles. Aerial reconnaissance to warn of missile attack now can be carried out from satellite. In such a context, an air defense identification zone becomes as useless as the Maginot Line, since its existence can be effectively ignored by an aggressor State making a strategic attack with modern weapons.[12]

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8) 2-10-1, Canadian Rules for the Security Control of Air Traffic.
9) Jappesen Airway Manual, Pacific I, 1977
10) E Cuadra, Air Defense Identification Zones : Creeping Jurisdiction in the Airspace, 18, V.J.I.L.,1978, at 495.
11) Jappesen Airway Manual, Middle East & South Asia I, chart, 1977.
12) E Cuadra, supra note 10, p. 496.

Professor E. Cuadra concluded;

(1) that extant international conventions tend to reject claims of jurisdiction over airfreights beyond the territorial sea.
(2) that self-defense cannot be a justification because of the absence of an imminent threat and of proportionality.
(3) that the practice of establishing ADIZ's has not become customary international law.

For the Professor E. Cuadra's opinion, I would introduce some cases for the reconnaissance in modern war period. Satellite Reconnaissances were unable to provide continuous through-the-weather coverage of Iraq's movements in deep Iraq's territory. So, the United States SR-71 force had obtained vital reconnaissance imagery pertaining to Middle Eastern interests on no fewer than eighty occasions when satellites broke down or were unable to poke through the atmosphere.[13]

② Proponent's Opinions

ⓐ The analogy to the Contiguous Zone

The British Hovering Acts were designed to win what then appeared to be an eternal battle against the smuggling trade.[14] By the Masterton's introduction, there may be mentioned four in this connection : ① The distance from which the smuggler hovered, operated, or became a menace to their revenue and legitimate trade; ② The type and speed of his craft; ③ The extent to which smuggling was carried on; ④ The commodity smuggled.[15] As early as 1934, the famous French authority, Gilbert Gidel, reasoned that the speed of airplanes and the possibilities for high altitude photo - reconnaissance made it necessary for the littoral

13) Anthony M. Thornborough, Sky Spies, Arms and Armour, 1993, at 9.
14) John Taylor Murchison, The Contiguous Air Space Zone in International Law, McGill Univ, 1955, at 36.
15) John Taylor Murchison, The Contiguous Air Space Zone in International Law, McGill Univ. Air and Space Law Institute, 1955 at 37-38.

State to exercise much greater power in order to protect its security interests, as compared with suitable measures when dealing with ships.[16] It may be argued in support of ADIZ regulations that advance notice of approaching aircraft is more important to a state than is the keeping of the contiguous waters clear of smugglers.[17]

With regard to the analogy to the contiguous zone, it is often stated that the purposes of the contiguous zone and the identification zones are different. The contiguous zone is established in order to prevent infringement of customs, immigration, fiscal or sanitary regulations for the contiguous zone.[18] Thus, to justify the identification zones by the analogies of the contiguous zone, seems to be insupportable.[19]

ⓑ The "Tacit Law Theory"

There is a "Tacit Law Theory" for the legal status of the ADIZ, but there is a different case for its theory. In 1956, during the Algerian insurgency against French rule, France established its "Zone d'Identification de Defense Aerienne," a zone extending over the high seas some seventy to ninety miles from the Algerian Coast. In May 1960, the President of the Presidium of the U.S.S.R. declared before the Supreme Soviet, following the incident involving the shooting down of a U.S. high-altitude reconnaissance aircraft, that the U.S.S.R. intended to establish similar zones to assure its national security.[20] The former U.S.S.R. has ignored the legal status of Japanese Air Defense Identification Zone.

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16) R. Hayton, Jurisdiction of the Littoral States in the "Air Frontier", 3, Philippine Int'l L. J. at 369, 381, 1964. See Gidel, G, Droit Int' l Public de la Mar, vol. 3, 1934, at 461.

17) I. L. Head, ADIZ, International Law and contiguous airspace, 3, Alberta Law Review 1964 at 182, 191.

18) UNCLOS Art. 33.

19) Riza Trumen, supra note 5, at 107.

20) N. Matesco, Deux Frontiers Invisible : De La Mer Territorials, A L'Air "Territorial", 1965, p.144. See also, E. Cuadra, Air Defense Identification Zones : Creeping Jurisdiction in the Airspace, 18 , V. J. I. L, 1978, at 495.

ⓒ "Self-Preservation" or "Self-Defense" Theory

Justification for the extra-territorial exercise of the jurisdiction claimed in the ADIZ and CADIZ regulations is rooted in "security". The title of the Canadian NOTAM (notification to airmen) which pronounced the CADIZ rules included the phrase "security control of air traffic" ; the text stated that the rules were necessary "in the interest of national security". The term "security" is synonomous with "protection of national existence". Self-defense is distinct from self-protection; the former is exercised in order to repel an attack, whereas the latter involves the taking of preventive measures.[21] We could find the "self-protection" theory in Monroe Doctrine. The sphere encompassed by the Monroe Doctrine exceeds by far the areas contained within ADIZ; indeed it includes the territory of foreign states in the western hemisphere whether or not these states have aligned themselves with the polices of the United States.[22]

The identification zones do not fall strictly under Article 51 of the United Nations Charter on the right of self-defense, since it requires occurrence of an armed attack. However, it can be argued that it can be justified on the ground of the concept of anticipatory self-defense. The opinions differ whether anticipatory self defence is a rule of customary international law or precluded by Article 51 of the UN Charter.[23]

The only effective defense is interception and destruction by defending fighter aircraft or guided missiles, and this before the attackers have come near to the target, and depends vitally on adequate identification in point of time.[24]

Many writers have written numerous articles to elaborate the legality

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21) Head, supra note 17, at 182.
22) Head, ibid at 182.
23) Riza Turmen, supra note 5 at 108. see also, Jane's Defence Weekly, Iranian Airbus controversy rages, 16, July 1988, at 64.
24) John Taylor Murchison, supra note at 79.

of ADIZ. And it is sufficient to quote here the conclusion of Professor Cooper:[25]

"The comparatively simple rule which is historically apparent, that international law accepts the fact that space over the high seas is not subject to the sovereignty of any state, would appear to be subject, however, to the principle that every sovereign state man, under certain circumstances, act beyond the limits of its territory to assure itself from injury. ADIZ is a clear application of the right of self-preservation and self-defense applicable outside national territory and international flight space."

The practice of ADIZ and then evidenced by the lack of official protests against this state practice, goes to prove the establishment of ADIZ is generally not considered as being an extension of territorial sovereignty, and may reasonably be regarded as having acquiesced to them. Though this tacit acquiescence is in itself insufficient, but forms a strong indication that a rule of customary international law does exist.[26]

Ⅲ. The sovereignty over Tokto islets

1. Japanese Practice in drafting Taegu FIR

With regard to the boundaries of the Taegu FIR (Korea FIR), the Committee was made aware that the working group which had dealt with the question had been unanimous that a Taegu FIR should be recommended for inclusion in the Regional Plan. However, it was also noted that the working group had not been unanimous regarding the

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25) John C. Cooper, Space Above the Sea, Explorations in Aerospace Law, ed. I. Vlasic, Montreal, McGill Univ. Press, 1968, at 198-199.

26) H. Meijers, How is International Law Made? The Stages of Growth of International Law and the Use of Its Customary Rules.", 9 NYIL, 1978, at 3-26. see also, P. Iswandi, supra note, at 88.

designation of its boundaries. Note was taken that in so far as disposition of the area bounded by a line joining the points 32°30N, 124°00E to 32°30N, 127°30E to 30°00N, 127°30 E to 30°00N, 124°00E was concerned, the working group had two alternative suggestions before it: one to retain this area within the Tokyo FIR, the other to include it in the Taegu FIR. A further suggestion in the working group that the area in question be included within the Okinawa FIR, which had been offered in a spirit of compromise, had not been pursued.[27] Taegue FIR was approved by ICAO Council on 10 April, 1963, and it was enter into force on 9 May, 1963.[28]

In the general statement by the delegation of Japan, first of all, the delegation of Japan is not convinced that the establishment of the boundaries of the Taegu FIR as detailed in Recommendation 18/1 is essential to the regional plan. The retention of the rectangular area (line joining the points Japanese delegate 32° 30N, 124° 00E to 32° 30N, 127° 30E to 30° 00N, 127° 30E to 30° 00N, 124° 00E) in the Tokyo FIR is by far the best way to secure safety of air traffic in the area. Secondly, the delegation of Japan is not happy with the manner in which Recommendation 18/1 was adopted insofar as Taegu and Tokyo FIR' s are concerned.

Also in the general statement by the delegation of Korea, the delegation of Korea stated that the details of technical factors related to the rectangular area in question were fully presented by both delegates of Korea and Japan and were discussed at length at the RAC/SAR Committee Meeting to let the Committee initiate and adopt the recommendation as it is reflected in Recommendation 18/1.

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27) ICAO second Pacific regional air navigation meeting (Vancouver, 1962, 9. 25 - 10. 16) Supplement No. 2 - 23 April 1963.

28) ICAO Aeronautical Information Publication, RAC 3-0, RAC 3-1.

The purpose of the FIR is to get the more efficient air traffic service rather than to national boundaries. We should concentrate that there was no Japanese delegation's objection against the boundary of Taegu FIR. If Japanese delegates had a cognition of the sovereignty over Tokdo islets. They had to objected to establish Taegu FIR, but they only objected the rectangular area.

2. Japanese Practice in KADIZ and JADIZ

KADIZ was established on 22 March, 1951 by the United States Pacific Air Force for the purpose of defending the Far East. JADIZ consists of Inner JADIZ and Outer JADIZ. The boundary of Okinawa was included in Outer JADIZ from May 1972. As a result, all of the Japanese territory is within JADIZ boundary. Until 1987, because of the former Soviet's air intrusion, the Japanese Air Force had operated scrambles more than one thousand times a year. Furthermore, the Japanese territorial airspace was intruded in several times by the former Soviet Air Force but the Japanese Government did not urge the Soviet Air Force aircrafts to follow the JADIZ regulations. For the Korean Air Force and Navy aircrafts, the Japanese Government has continued to keep the strict regulations. The Korean Government has tried to enlarge the KADIZ boundary to keep more efficient air operations and search and rescue operations but these were not accepted by the Japanese Government.[29] The Japanese Government did not object to the KADIZ's boundary including Tokto airspace from 1951 until now.

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29) 1963. 5.30. Korea proposed to UN/UNA to enlarge the KADIZ boundary up to Taegu FIR boundary. same cases; 1966. 9. 21, 1966, 11. 25, 1967. 6. 30, 1969. 5. 30, 1971. 1. 19, 1971. 3. 18, 1979. 7. 5, 1979. 7. 12, 1980. 2. 29, 1980. 3. 17, 1980. 3. 27 etc.

Ⅳ. Conclusion

The National Aerospace consists of the Territorial Airspace, Flight Information Region and the Air Defense Identification Zone. Article 1 of the Chicago Convention (1944) defines the sovereignty of the Territorial Airspace.

And the legal status of the Flight Information Region comes from the need for efficient service rather than to national boundaries.

ADIZ is a clear application of the right of self-preservation and self-defense applicable outside national territory and international flight space. ADIZ is generally not considered as being an extension of territorial sovereignty. The States' tacit acquiescence for the ADIZ regulations is in itself insufficient to protest the legal status of the ADIZ, but it could make a strong indication that a rule of the customary international law does exist.

The Japanese Practice in drafting Taegu FIR, the area bounded by a line joining the points 32° 30N, 124° 00E to 32° 30N, 127° 30E to 30° 00N, 127° 30E to 30° 00N, 124° 00E was concerned. The purpose of the FIR is to get the more efficient air traffic service rather than to national boundaries. We should concentrate that Japanese delegation did not object against the boundary of Taegu FIR which including Tokto airspace. If the Japanese delegation had a cognition of the Japanese sovereignty over Tokto islets, they had to object to the boundary of the Taegu FIR, but they only objected to the rectangular area, 32° 30N, 124° 00E to 32° 30N, 127° 30E to 30° 00N, 127° 30E to 30° 00N, 124° 00E in Taegu FIR.

In Japanese Practice in KADIZ and JADIZ, the Japanese Government has continued to keep the strict regulations against the Korean Air Force and Navy aircraft. The Japanese Government has not objected for the KADIZ boundary including Tokto airspace. According to the KADIZ and JADIZ regulations if the Japanese Air Force aircraft wants to fly over Tokto islets, the Japanese Government should get the permission from the Korea Government. Logically, we conclude that the Japanese

Government delegation of the drafting Taegu FIR and JADIZ had no cognition for the Japanese sovereignty over Tokto islets.