

JAPAN REVIEW

Vol.3 No.2

Fall 2019

ISSN 2433-4456

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Publisher : Kenichiro Sasae, President, JIIA

Editor in Chief : Daisuke Nakano, Director of Research Coordination, JIIA

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For subscription (subscription fee may apply) and any other inquiries, please write to:
Japan Review, the Japan Institute of International Affairs,
3rd Floor Toranomon Mitsui Building, 3-8-1 Kasumigaseki Chiyoda-ku, Tokyo Japan 100-0013

ISSN 2433-4456

Published by the Japan Institute of International Affairs
Designed and Printed in Japan by Taiheisha.Ltd

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Territory and Maritime Issues in East Asia and their Origins

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The South China Sea Arbitration and Beyond: China's Approach to the Law of the Sea and the Rule of Law*

Paul Reichler**

Abstract

Within the South China Sea Arbitration, there were a number of significant issues. Among them, the author sees that the two issues stand out above the others. One is China's claim to the waters and seabed of the South China Sea based on its so-called nine-dash line and the other is the maritime entitlements of the islands in the South China Sea—particularly those of the Spratly Islands. The author discusses what these issues meant, tying it into the developments between China and the Philippines in the South China Sea since the Arbitral Award and how it has affected the attitudes and actions of other South China Sea coastal States. Comparing China's approach to its neighbors in the South China Sea with its approach to its neighbors to the East—South Korea and Japan—in regard to maritime issues, the author also points out that China does not eschew international law in setting out its maritime boundary claims. To the contrary, it attempts to justify its far-reaching claims on the basis of international law, specifically, UNCLOS and customary international law. It allows China to present itself to the outside world as respectful of the rule of law. Being seen as law-abiding enhances their reputation and their “soft” power, that is, their ability to influence the conduct of other States. The author concludes that these disputes can, and will, only be resolved by agreements between or among China and the various other protagonists although it will take time and will not be easy.

1. The Chagos Archipelago Case

Good afternoon, everyone. The topic that I have been asked to speak about is, “The South China Sea Arbitration and Beyond: China's Approach to the Law of the Sea,” and I will come to that in a moment. Before I address that topic, I was asked by the organizers if I would make a few remarks about the International Court of Justice (ICJ)'s recent advisory opinion issued on 25 February 2019, in the case involving the Chagos Archipelago. I had the honor of being counsel to Mauritius in that case, and I was present during the reading of the advisory opinion.

Briefly, the case involved the decolonization of Mauritius. In 1965, prior to the granting of independence of Mauritius by the British, the British themselves divided the colony of Mauritius, keeping for themselves a portion of that colony, specifically, the Chagos Archipelago, and creating a new colony, which they called the British Indian Ocean Territory. They did that for the purpose of leasing the main island, Diego Garcia, to the United States for use as a military base.

* This is an edited transcript of a keynote speech made by the author at the symposium “Territory and Maritime Issues in East Asia and their Origins,” hosted by JIIA, Doshisha University Center for Study of South China Sea, and Faculty of Law Doshisha University on March 2, 2019.

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In 1968, Mauritius was granted independence, but without the Chagos Archipelago. As a sovereign state, Mauritius never stopped demanding the return of that piece of its territory, which had been severed from it by the British prior to the granting of independence.

Because the British have reservations to their acceptance of ICJ jurisdiction, it was not possible for Mauritius to bring a contentious case against the United Kingdom; however, after many years of presenting the issue before the General Assembly of the United Nations, in 2017 the General Assembly adopted a resolution by an overwhelming vote to submit the matter to the International Court of Justice in the form of a request for an advisory opinion, and specifically, the General Assembly asked the Court to answer two questions.

One, given that the Chagos Archipelago was severed from Mauritius prior to independence and remained under British rule, was the decolonization of Mauritius ever lawfully completed?

And two, what are the consequences, the legal consequences today, of the continued colonial administration of the Chagos Archipelago?

The court answered both questions, and because these were advisory proceedings, every State that is a member of the United Nations had an opportunity to participate if it chose to do so. Some 30 States did, either through written submissions or at the oral hearings. The vast majority spoke in support of Mauritius' position.

In response to the first question, the Court determined that the decolonization of Mauritius was not lawfully completed. This was because it was unlawful in 1965 for the British to dismember the colonial territory and to establish a new colony since, as of 1965, international law had already crystallized into a rule, a customary rule, requiring the decolonization of subject peoples, of non-self-governing peoples, in accordance with the freely exercised self-determination of those peoples; and the United Kingdom had failed to respect the right of self-determination of the people of Mauritius when it severed the Chagos Archipelago and excluded it from the decolonization of Mauritius.

In fact, the United Kingdom not only retained control of that part of Mauritius, but forcibly removed the native population of these islands, against their will, leaving their possessions behind, and deposited them in Mauritius and the Seychelles. It was, as the Court found, a horrendous violation of their human rights.

In response to the second question, in regard to the legal consequence of the United Kingdom's failure to lawfully complete the decolonization of Mauritius, the Court ruled that the U.K.'s ongoing colonial administration of the Chagos Archipelago is an internationally wrongful act, which is continuing in nature, and that the U.K. is obligated, under international law, to terminate that administration as rapidly as possible.

The Court also ruled that, because self-determination and decolonization are principles so fundamental to international law that they have *erga omnes* application, other Member States of the United Nations must cooperate in bringing about the decolonization of Mauritius, and must not contribute to or support the continued colonial administration by the British.

Now, this is an advisory opinion, so it is not a legally binding judgment of the Court; however, it is an authoritative determination of the legal status of the Chagos Archipelago, and the obligations of the United Kingdom under customary international law, issued by the highest judicial authority in the international legal system. Hopefully, the British, who have always professed their commitment to the rule of law, will comply with their legal obligation to complete the decolonization of the Chagos Archipelago by terminating their colonial administration as rapidly as possible.

Mauritius, meanwhile, will return to the United Nations General Assembly, now that the Court answered the General Assembly's questions, for a further resolution implementing the Court's rulings.

I will now turn to my main topic, the "South China Sea Arbitration and Beyond," and discuss,

in this context, what appears to be China's approach to the law of the sea.

2. A Review of China's Maritime Claims in the South China Sea and the Arbitral Tribunal's Award

The award is over 400 pages, so naturally I can only summarize it. I did give a presentation on the award in some detail at a JIIA symposium in Tokyo two years ago, and my presentation has been published by JIIA, and is available to any of you who might be interested.¹ There were a number of significant issues in that case. Today, I will focus on the two issues that, in my judgment, stand out above the others.

The first of these issues is China's claim to the waters and seabed of the South China Sea based on its so-called nine-dash line. China claims not only sovereign rights, but actual sovereignty over all of the waters and seabed within the limits of this nine-dash line. If you have seen it depicted on a map, you know how exaggerated a claim this is. The South China Sea is shaped like a bucket with the top being the mainland coast of southern China. The nine-dash line is like the tongue of a cow, which reaches down from the top of the bucket almost entirely to the bottom. It extends more than 600 miles from the Chinese mainland coast, and comes very close to the Philippines, Malaysia, Brunei, Indonesia and Vietnam, within 35 to 50 miles of their coasts. China's claim, therefore, overlaps and purportedly negates the vast majority of their 200-mile maritime entitlements under the United Nations Convention on the Law of the Sea (UNCLOS), to which China and all of the other States are parties.

3. UNCLOS and Historic Rights to Maritime Areas

China makes this extremely exaggerated claim based on its alleged historic rights, and it claims that its historic rights supersede the legal rights of its neighbors under UNCLOS. The tribunal decided that this is a completely untenable claim, which has no basis in international law. The tribunal decided this unanimously. It held that when the States Parties adopted UNCLOS in 1982, they specifically rejected the idea that any previously claimed historic rights in areas beyond the 12-mile territorial sea would survive the Convention. The new regimes for the exclusive economic zone and continental shelf out to 200 miles, beyond the 12-mile territorial sea, were adopted with the express intention of voiding and replacing any previously existing claims, based on historic or economic rights, to areas then considered "high seas." Thus, China could not lawfully claim to have historic rights in areas beyond 12 miles from its coasts, although it could claim, like any other coastal State under UNCLOS, an exclusive economic zone and continental shelf extending up to 200 miles, but no farther.

The tribunal further found, also unanimously, that even under customary international law, prior to UNCLOS, China could not make a credible claim of historic rights to any part of the South China Sea far removed from its coasts. Under customary international law, a claim of historic rights to an area must be based on continuous administration of the area, under claim of title, over a long period of time, to which other States acquiesce. The tribunal ruled that there was no evidence to support China's historic rights claim. Indeed, up until the end of World War II, China had never even made a claim to any part of the sea south of the Paracel Islands, let alone exercised continuous administration over it, or enjoyed the acquiescence of any other State to its dominion.

Historically, there were long periods, sometimes lasting centuries, when China itself, under the emperors, forbade Chinese vessels from navigation in the South China Sea, in an effort to

¹ The lecture made by the author has been published on the website of Japan Information Center, JIIA. For details see Paul Reichler, "The Rule of Law and the Path to a Just and Lasting Peace in the South China Sea," *Japan Review* Vol.1 No.2, https://www.jiia-jic.jp/en/japanreview/pdf/JapanReview_Vol1_No2_Winter_2017.pdf

close China off from the influence of the European colonial powers. So, the idea of any continuous administration under claim of title over a prolonged period of time, let alone with acquiescence of neighboring States, just had no evidence whatsoever to support it.

Of course, UNCLOS replaced customary international law in regard to maritime rights in the South China Sea. But even under customary law, the arbitral tribunal found, China's nine-dash line claim was groundless.

4. Islands and Maritime Entitlements

The other major issue decided by the tribunal, in my judgment, concerned the maritime entitlements of the islands in the South China Sea, and particularly those of the Spratly Islands. It was China's position that it was sovereign over all of the Spratly Islands, that they constituted an archipelago, and thus straight lines could be drawn connecting the outermost features, from which maritime entitlements up to 200 miles would extend.

The tribunal unanimously rejected China's thesis. First, it decided that it did not need to determine which State was sovereign over these disputed islands, because maritime entitlements do not depend on who is sovereign; they depend on the nature of the particular insular feature under Article 121 of UNCLOS.

The tribunal found that the Spratly Islands are not entitled to archipelagic status, because, under UNCLOS, which replaced customary international law, archipelagic status is conferred only on an "archipelagic State," which is defined in the Convention as a State whose maritime areas exceed its land territory by a ratio of up to 9:1. In comparing land to maritime area, the entire continental, as well as insular, landmass of the State must be taken into account. It is impossible to claim archipelagic status solely for a group of outer islands, like the Spratlys, without including China's entire landmass. When that is included, the land territory exceeds the maritime areas, and archipelagic status is unavailable.

The tribunal then considered whether the individual islands were entitled, under UNCLOS, to 200-mile maritime areas, or whether their entitlements were limited to only a 12-mile territorial sea. In doing so, it was called upon to interpret Article 121(3) of UNCLOS, which denies any maritime area beyond 12 miles to any island that constitutes a mere "rock," which is defined as an insular feature that is not capable of sustaining human habitation or economic life of its own. The tribunal carefully analyzed all of the largest islands in the Spratly Group, especially the largest, Itu Aba, which is claimed by China, the Philippines and Vietnam, and is actually occupied by Taiwanese government forces. It ruled that neither Itu Aba nor any other Spratly feature naturally provided the essential elements for sustaining human life, that they were therefore "rocks" under the Convention, and lacked any maritime entitlements beyond 12 miles.

As a result, the tribunal found, China was limited in its maritime entitlements in the South China Sea to a 200-mile exclusive economic zone and continental shelf, measured from its mainland coast, and a 12-mile territorial sea from any island in the Spratlys over which it may be sovereign.

When one overlays the picture of China's entitlements onto the 200-mile entitlements from the coasts of the Philippines, Malaysia, Indonesia and Vietnam in particular, one finds that China's entitlements do not, in fact, overlap much of the entitlements of the other States; that is, all of the other States are entitled to enjoy almost the entirety of their 200-mile entitlements under UNCLOS, free of any lawful Chinese claim.

5. China's Rejection of the Award

China, as we know, has formally rejected the findings of the tribunal, and its award. It decided not to participate in the proceedings, and it tried mightily to discredit them. It has denounced the arbitrators individually, and it has gone to great lengths to publish and promote criticism of their

award. But, significantly, while it has denounced the award, it has not withdrawn from UNCLOS. Indeed, it has tried to defend its claims by arguing that they are consistent with UNCLOS, and that the tribunal made an erroneous interpretation of the Convention.

I think this is very significant, for reasons that I will come to. But, first, let us look at what China is now arguing. On historic rights, they argue that the Convention does not replace historic rights that existed under customary international law within the regime of the exclusive economic zone and continental shelf, but that historic rights and the new regimes exist side by side. China may be the only State in the world that advances this interpretation of the Convention, which the arbitral tribunal flatly rejected. But I think it is significant that China continues to argue that its claims fall within UNCLOS, thus reinforcing its adherence to the Convention.

On islands, too, China continues to argue that its claims are consistent with UNCLOS: specifically, that the Spratlys constitute an outlying archipelago of China, and their archipelagic status is well-founded under customary international law. Again, the five arbitrators all rejected this claim, as would most, if not all, experts on UNCLOS. But it is not insignificant that China is attempting to defend its claims not by rejecting UNCLOS but by insisting that they are permissible under the Convention. I will offer my thoughts on why China takes this approach in the final section of my presentation.

6. Developments between China and the Philippines in the South China Sea Since the Arbitral Award

Let me now review what has happened between China and the Philippines since the issuance of the arbitral award in July of 2016.

First, as you know, there was a change in government of the Philippines just prior to the issuance of the award, and they adopted a different policy toward China. They made a decision that they would not, indeed they could not, abandon the award or the benefits that they obtained under it. But they decided not to insist on compliance directly to the Chinese. Instead, they adopted a policy of friendliness toward China, and they have reaped significant Chinese investment and increased trade in return.

Second, the Chinese have allowed Philippine fishermen to return to fish at Scarborough Shoal, which China had blocked since 2012. This was one of the reasons the Philippines brought its case against China. The arbitral tribunal ruled that China's prevention of Philippine fishing activity at Scarborough Shoal was a violation of the fishermen's historic fishing rights, and that they should be allowed to return to fish there. In this sense, China is now complying with one of its obligations under the award.

Third, China has engaged with the Philippines about joint development of the resources at Reed Bank, a maritime area that lies between the Spratly Islands that China claims and the Philippine coast at Palawan. The seabed in that area is believed likely to hold huge petroleum deposits. Prior to and during the arbitration, China threatened and used force to keep the Philippines from exploring in this area, which is 100 miles off the Philippine coast and plainly within the Philippine continental shelf and exclusive economic zone. As a result of China's recent approach, the two States are in discussion about joint development. Although no agreement has yet been reached, it may well be that the Philippines gets to enjoy the resources of its continental shelf in collaboration with China.

7. Attitudes and Actions of Other South China Sea Coastal States

The attitudes and actions of other South China Sea coastal States after the issuance of the award are also significant.

Of course, the award is binding only between China and the Philippines; however, some of the tribunal's findings—including the invalidity of China's nine-dash line and its incompatibility

with UNCLOS, and the ruling that none of the Spratly Islands generates an entitlement beyond its 12-mile territorial sea—are as beneficial to Vietnam, Malaysia and Indonesia as they are to the Philippines.

Despite its rejection of the award, China has been careful to avoid confrontations with the other South China Sea States. It does not appear to have engaged in any further drilling or exploration for oil within 200 miles of their coasts; nor has it attempted to prevent fishermen from those States from fishing within these limits.

Moreover, China has not undertaken any action to challenge their hold on the islands in the Spratly group that they already occupy. To be sure, China has consolidated its hold on the islands in this group that it already occupied prior to the arbitration. It has ominously built military facilities on them, which some States regard as a threat to peace and security, but it has not attempted to dispossess Vietnam, Malaysia, or the Philippines of any of the islands that they hold. So, it seems that China has been a bit more cautious, and not especially aggressive, vis-à-vis the other States in the wake of the arbitral award.

The other States have been cautious, as well. Vietnam, Malaysia and Indonesia, in particular, have interests similar to those of the Philippines, and they have made very clear their refusal to accept the nine-dash line and China's exaggerated claims. Similarly, they reject China's claims of exaggerated entitlements from small islands. But they have not been particularly effective in challenging China, because they have acted individually rather than collectively. The decision of the Philippines, shortly after the issuance of the arbitral award, to deal with China bilaterally—a decision that China encouraged and welcomed—made collective action less feasible. ASEAN has not been effective in mounting a collective approach, because it acts by consensus and includes some States that are subservient to China's interests. Only an alliance between the Philippines, Vietnam, Malaysia and Indonesia would have a chance of winning concessions from China.

There is strength in numbers, and an alliance of these States could bring greater pressure on China to accommodate their lawful and legitimate interests, if they act together. But this will not happen as long as the Philippines, under President Duterte, remains committed to its go-it-alone approach vis-à-vis China. This approach is, of course, welcomed by China, which prefers dealing with each of the South China Sea States on a bilateral basis, which allows China to take greater advantage of its superior power.

8. UNCLOS and China's Claims in Regard to Maritime Delimitation with South Korea

It is interesting to compare China's approach to its neighbors in the South China Sea with its approach to its neighbors to the East, namely South Korea and Japan, in regard to maritime issues.

China and South Korea face each other across the Yellow Sea, where the boundary has not yet been delimited. There have been sporadic attempts to initiate negotiations. China's approach has been that before the parties can agree on a maritime boundary, they should agree on the equitable principles that will govern the delimitation of the boundary.

This contrasts with the approach to delimitation taken by the ICJ, ITLOS and UNCLOS arbitral tribunals. UNCLOS itself prescribes that boundary delimitation in the exclusive economic zone and continental shelf should be based on equity, and international tribunals have adopted a clear methodology for achieving that objective via a three-stage process: first, drawing an equidistance line or a median line, then assessing whether there are relevant geographic circumstances which make the equidistance line inequitable, in which case an adjustment would be made to it, and then test to make sure the line does not result in a disproportionate division of the disputed maritime area between the two parties.

But China resists the standard "equidistance" approach to boundary delimitation. Instead, it

has proposed to South Korea that, instead of drawing a median line (and adjusting it as needed), the boundary in the continental shelf should reflect the fact that the vast majority of the seabed in the Yellow Sea, the sediments, originate in China and are carried to the Sea by Chinese rivers; on this basis, China claims that it is entitled to the vast majority of the continental shelf between the two States.

This is an interesting theory, and it is not bad science. But it is bad law. Boundary delimitation in the continental shelf does not depend on the source of the sediments that comprise it. In fact, this theory was addressed, and rejected, by ITLOS in the delimitation case between Bangladesh and Myanmar. Bangladesh argued for a greater share of the continental shelf in the Bay of Bengal because most of the sediments were deposited by the major river systems—the Ganges and the Brahmaputra—that traversed Bangladesh. Not a single one of the 23 judges on that tribunal (including two ad hoc judges) agreed that this was a relevant factor in the delimitation of the continental shelf. Instead, the tribunal applied the standard three-step process.

The point here is that China does not eschew the law. It attempts to justify its claim on the basis of a legal theory that it considers consistent with UNCLOS, or with customary international law, but which plainly is not. This is similar to China's invocation of the nine-dash line in the South China Sea, and China's argument that it is consistent with UNCLOS and customary international law.

9. UNCLOS and China's Claims in Regard to Maritime Delimitation with Japan

We can see the same patterns in China's approach to maritime delimitation with Japan.

Japan, by virtue of its legislation, claims that the boundary shall be determined by agreement, but in the absence of agreement it shall be a median or equidistance line. This is consistent with UNCLOS. Because the distance between that parties' coasts is less than 400 miles, their respective 200-mile entitlements to an exclusive economic zone and continental shelf overlap. In such circumstances, UNCLOS and the case law interpreting it require that the boundary be delimited by a median line, with appropriate adjustments to accommodate any relevant geographical factors that might exist (if any).

China, however, rejects that approach. This is what their Ministry of Foreign Affairs wrote in 2015: "China claims that the 200-mile exclusive economic zone and China's continental shelf in the East China Sea prolongs naturally to the Okinawa Trough." Now this of course is a very serious issue for Japan. China rejects equidistance in favor of geological continuity. It claims that its maritime entitlements extend beyond the median line with Japan, and even beyond 200 miles from its own coast, all the way to the geological breach in the seabed known as the Okinawa Trough, which is much closer to Japan than to China.

There are two serious problems with China's approach. First, the EEZ is unrelated to the seabed; it consists only of the waters above the seabed, and UNCLOS does not permit it to extend beyond 200 miles in any circumstances. China appears to be confusing, perhaps deliberately, the EEZ and the continental shelf.

Second, in regard to the continental shelf, China invokes Article 76(1) of UNCLOS, which entitles each coastal State to a shelf extending up to 200 miles from its coast, or, in some cases, longer, if there is a natural prolongation. However, even if the Chinese shelf naturally extends beyond 200 miles, there is a difference between "entitlement" and "delimitation." China's "entitlement" might be more extensive than Japan's 200 mile "entitlement," but the extension completely overlaps with Japan's "entitlement." Where there are overlapping entitlements, a delimitation is required. And, as the ICJ and other international tribunals have consistently ruled, delimitation begins with a median or equidistance line. It does not follow the geological features of the seabed.

10. Observations on China's Commitment to UNCLOS and the Rule of Law

Of course, we are not here to delimit the maritime boundary between China and Japan. Our purpose is to discern and understand China's maritime claims and their purported justifications. And what we see in the East China Sea is consistent with the pattern observed in regard to China's approaches in the South China Sea and the Yellow Sea. Here again, China does not eschew international law in setting out its maritime boundary claims. To the contrary, it attempts to justify its far-reaching claims on the basis of international law, specifically, UNCLOS and customary international law. This allows China to present itself to the outside world as respectful of the rule of law.

Many experts thought that China would withdraw from the Convention after the July 2016 arbitral award. But it did not. China remains a party to UNCLOS and it continues to profess its commitment to UNCLOS. It even claims to be complying with the Convention. This is helpful, and it is an important starting point for thinking about solutions to some of these problems, even if we regard China's legal interpretations as self-serving and implausible.

11. UNCLOS and Disputed Islands in the South China Sea, East China Sea and Sea of Japan: Is There a Path to Settlement?

Why does China remain a party to UNCLOS and present itself as law-abiding and respectful of the rule of law? It must be because China considers that its national interest is best served this way. Why might this be so? Because China, like other States, recognizes the value of "soft" power, that is, the influence that is generated by the reputation the State establishes in the international community, through its behavior. No one needs an explanation of how "hard" power—including military and economic might—generates influence. "Soft" power, by contrast, is more subtle and less easy to appreciate or measure. But there is no question that it exists, and that it is important to States. This is demonstrated in many ways. One is the way States invariably attempt to justify their actions as lawful. Even obviously aggressive behavior is almost always defended by the perpetrator as consistent with international law. Why do States go to this trouble?

Because they know that being seen as law-abiding enhances their reputation and their "soft" power, that is, their ability to influence the conduct of other States. China, as its behavior demonstrates, understands this.

The question is: does China's interest in being seen as law-abiding create opportunities for peaceful and equitable settlement of its disputes with neighboring States in the South China Sea, the Yellow Sea or the East China Sea? And what forms could a dispute settlement process take?

We can probably rule out international arbitration, at least for the foreseeable future. China rejects it. It won't participate. So the arbitration provisions of UNCLOS would not be helpful to other States that have disputes with China. Although it would still be possible to instigate an arbitration against China, and even to obtain an award, the knowledge that China won't participate and will inevitably refuse to accept the award diminishes the value of such an approach. So what can else be done?

The Convention also provides for compulsory conciliation. This is a less confrontational or adversarial approach, more akin to mediation than litigation. It actually succeeded between Timor-Leste and Australia, the only States ever to employ it, and it produced an agreement. Is it possible that China would accept conciliation if it were instigated by Vietnam, for example, or Indonesia (or South Korea or Japan)? What makes conciliation potentially attractive is that the result is either an agreement between the parties, or a recommendation by the conciliators; it does not produce a binding judgment, or compel any State to accept a solution it finds objectionable. Even if the current position of China is to reject all forms of third-party dispute settlement, it might find, eventually, that a mediated settlement negotiation process (which is what conciliation fundamentally is), might be preferable to a permanent stalemate and a frozen conflict.

Another possibility for addressing China's "unique" interpretations of UNCLOS, would be to seek an advisory opinion from the ICJ or ITLOS. This would not be a contentious proceeding and would not require China's consent. It is more difficult to seek an opinion from the ICJ, which requires a resolution of the U.N. General Assembly requesting one. ITLOS merely requires a request from any international organization whose charter authorizes it to make such a request, including a newly-formed organization that is created for that purpose. ITLOS also has the advantage of including a Chinese judge (as well as judges from Japan, South Korea and Thailand). Opinions might be sought on the following questions: Did historic rights claims to areas beyond 12 miles survive the Convention and the regime of the EEZ and the continental shelf? What elements are required to support a claim of historic rights under customary international law? May a continental state that claims a few offshore islands consider itself an archipelagic state under UNCLOS? Does the origin of sediments that comprise the continental shelf constitute a relevant factor in the delimitation of the boundary in the shelf? Does natural prolongation of a State's shelf take precedence over a median line in delimitation of the boundary in the shelf? These are questions quite suitable for an advisory opinion, and the opinion(s) given, which would be likely to undercut China's legal arguments, might help achieve progress in negotiating settlements of the various disputes.

In the end, these disputes can, and will, only be resolved by agreements between or among China and the various other protagonists. This will take time, and it will not be easy. It will take persistence on the part of China's neighbors, and most likely their cooperation and coordination with one another. And it will also require a change in China's attitude, and a conclusion on China's part that its national interest can be better served by reaching equitable accommodations with its neighbors, in ways that respect their rights under UNCLOS as well as China's, and demonstrate the commitment of all to the rule of law, than by permanent stalemate and interminable conflict, with the attendant risk of escalation and descent into violence.

China's "Territorial Sovereignty" and Its Origins*

Takashi Okamoto**

Abstract

The roots of the Chinese concept of "territorial sovereignty" can be traced back to the concepts for tributaries or dependencies: *shudi* and *fanbu*. Moreover, these concepts can also be replaced by the word *fanshu*. Since the word *fanshu* was also used for lost *shuguo*, such as Korea, Vietnam, and Ryukyu, the fear of losing territory came to be embedded in the Chinese psyche from early on. Territory is a concept that implies sovereignty. This is in line with conventional theory. However, the notion that territorial sovereignty is always at risk of being lost, must always be protected, and must never be yielded comes across as a very Chinese way of thinking. The historical process by which territory was lost can be said to have been imprinted in the Chinese understanding of the legal concept of "territorial sovereignty." Since this is the starting point of some of the demands and claims of modern China, we might suspect that the roots of certain ongoing disputes can also be traced to this historical background.

Paul Reichler, the lead counsel for the Philippines in its arbitration case with Beijing over claims in the South China Sea, has said it should be possible to have a dialogue with China using a common language and the language of law. Put differently, this means that we are currently not speaking the same language and that we are not having a dialogue with China. While what China says and what the West and Japan say might appear to be the same on the surface, their messages have entirely different content.

My mission as a historian specializing in China is to look to the past and analyze why and where this situation came about. I will focus on the notion of "territorial sovereignty" as a typical example of terms and concepts that have different meanings, depending on the user. The term "territorial sovereignty" gained currency in China no more than about a century ago. The concept did not exist prior to that, and it may not have been required by the order of things. I would like to start by discussing this background.

1. The Qing's World Order and the *Fanshu* Concept

What was China's world order prior to the 20th century? I have tried to give an explanation by way of an illustration. There is no limit to how much detail I can get into about the Qing's world order, so I will break it down into four broad categories.

* This article is based on a presentation made by the author at the symposium "Territory and Maritime Issues in East Asia and their Origins" held by JIIA, Doshisha University Center for Study of South China Sea and Faculty of Law Doshisha University on March 2, 2019.

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***hushi* (互市): linked by trade**

E.g.: Western powers, Japan

***shuguo* (屬國): tributaries**

E.g. : Korea, Ryukyu, Vietnam

***fanbu* (藩部)**

E.g. : Tibet, Mongolia, Xinjiang

***zhi-sheng* (直省): provinces**

China proper

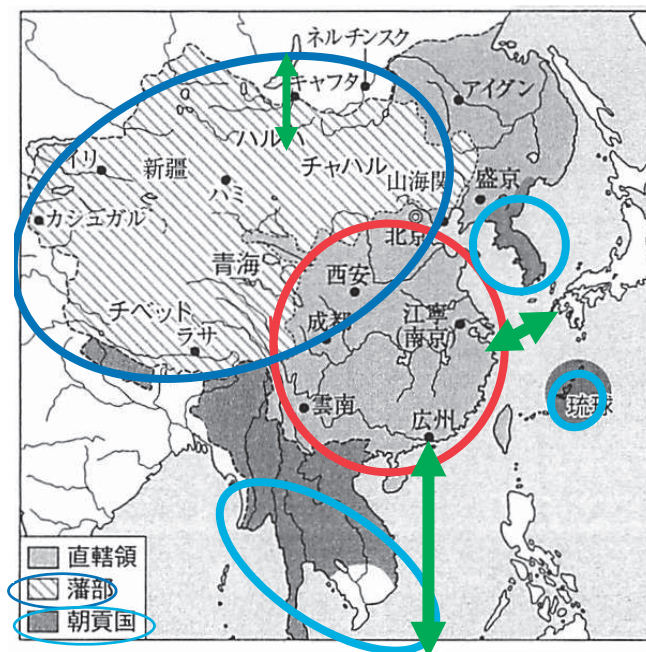


Fig. 1 Four Categories in the Qing's World Order

early 19C		late 19C – 20C		
Tributary <i>chaogong</i> (朝貢)	Korea Ryukyu Holland Vietnam Siam Portugal Sulu Burma Laos	Korea Ryukyu Vietnam Siam Sulu Burma Laos	<i>shuguo</i> (屬國)	"Loss"
	Xinjiang Tibet Mongolia Russia	Xinjiang Tibet Mongolia Russia		
<i>fanbu</i> (藩部)		Portugal France Great Britain Holland Japan	<i>shudi</i> (屬地)	Territory <i>lingtu</i> (領土)
Trade <i>hushi</i> (互市)			Treaty Relations	Diplomacy

Table 1 Transformation of the Qing's World Order Except China Proper¹

¹ Table prepared by the author based on Okamoto Takashi, *Chugoku no tanjo* [The Birth of China] (University of Nagoya Press, 2017), p. 413, Table 5.

First, we have countries linked by trade relations, or *hushi*, represented by the green arrows in Fig. 1. The areas marked with light blue lines were tributaries, meaning countries taking part in tributary relations, and were referred to as *shuguo* in the Chinese terminology of that time. These were countries such as Korea, Ryukyu, and Vietnam. Then there were the *fanbu*, areas in the northwest indicated with blue lines. The *fanbu* were Tibet, Mongolia, and present-day Xinjiang. Finally, there was so-called China proper, in the southeast of the map, which was where the Han Chinese lived. The term for this area was *zhi-sheng*.

The Qing's relationships can be classified in four categories based on original sources from that time, and be summarized in Table 1. And Fig. 1 is the map on which the relationships have been diagrammed.

Western countries and Japan had *hushi* relationships with the Qing. This means that there were no formal relations between governments, just local trade. These relationships generally changed into treaty-based ties, beginning in the second half of the nineteenth century. These countries entered into diplomatic relationships with China at a relatively early stage.

What can we say about the other categories of *shuguo* and *fanbu*, which are marked in blue on the map? This question has to do with the concept of "territorial sovereignty."

First, we have the expression *shuguo*. *Shuguo* refers to countries surrounding China that gave tribute to the Qing. We talk about *shuguo* (tributary) and *shangguo* (superior country) because when countries offer tribute to the Chinese emperor, this creates a hierarchical relationship of sovereign and subject. Since tribute and the sovereign-subject hierarchy were based on Confucian concepts and rituals, such relations were formed with neighbors that understood the Chinese language and Confucianism.

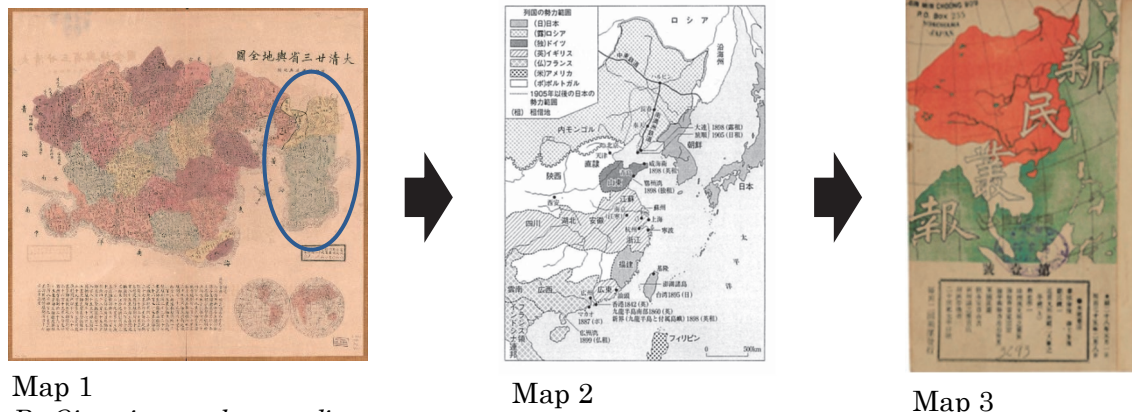
Conversely, other countries could not enter into *shuguo* or tributary relations. While a country such as Japan ended up in the *hushi* category rather than *shuguo* because of historical circumstances, it would not be an exaggeration to say that ultimately this was because Japan did not understand Chinese and Confucianism.

Likewise, *fanbu* was another category where Chinese and Confucianism did not apply. *Fanbu* specifically referred to Mongolia, Tibet, and Xinjiang. They were similar in that they geographically belonged to an inland world of steppes, did not use Chinese as their language, and did not follow Confucianism. Xinjiang was Muslim and Turkic, while Mongolia and Tibet adhered to Tibetan Buddhism. They differed quite markedly from the countries in the other categories in terms of social organization, manners, and customs.

This is why I differentiate between *shuguo* and *fanbu* here. Yet, looking at Chinese sources from the time, the two are often jointly referred to as *fanshu*, which is a relatively uncommon Chinese word.

2. From *Fanbu* to *Shudi*

Map 1 on Fig. 2 shows the situation on the Korean peninsula following the First Sino-Japanese War. After this conflict, as was stipulated in the first article of the Treaty of Shimonoseki, Korea became "independent" as the Great Korean Empire. That is, Korea ceased to be a Chinese *shuguo*. Many sources at that time described Korea's "independence" as the termination of Korea's status as a Chinese *shuguo* and *fanshu*.



Map 1
Da Qing niansan sheng yudi
quantu [Complete map of the 23
provinces of the Great Qing]

Map 2

Map 3

Fig. 2 “Loss” of *Shuguo* (Dependencies) and Rise of “Sovereignty”²

Meanwhile, sources of the time commonly treated *shuguo* and *fanbu* as being more or less equal and interchangeable terms. Even though the Korean peninsula and Tibet were governed completely differently, they were frequently referred to using the same terms and Chinese words. Not only was Korea sometimes called *fanbu* like Tibet and Mongolia, but Tibet and Mongolia were also called *shuguo* by some sources.

Vietnam, Ryukyu, and Korea had all ceased being *shuguo* of the Qing by the end of the nineteenth century. It goes without saying that this was because they were annexed by the Western powers and Japan. This is why the word “loss” has been used in Table 1. The loss of the *shuguo* became a major issue.

In 1897, Korea became the last *shuguo* to lose its ties with the Qing. At around the same time, the Western powers began to obtain rights in China in a process called “the scramble for concessions,” which lasted until the end of the nineteenth century. The Chinese at the time called this process *guafen*, meaning a melon being taken apart and eaten, which is illustrated in Fig. 2–Map 2. Qing and Chinese officials of this time and beyond became extremely worried about the potential partitioning of China.

The Qing became obsessed with the idea that while the *shuguo* were lost, they had to retain the remaining *fanbu* or they would have a real crisis on their hands.

Even before this, from the 1880s into the 1890s, Tibet, Mongolia, and Xinjiang—which had been referred to as *fanbu*—increasingly came to be referred to as “colonies,” especially by late-Qing era Chinese diplomats stationed in the West, as well as by Han Chinese who had absorbed Western scholarship and concepts.

This identification of *fanbu* as colonies seems to have started with the translation of Western terms, such as “colony” and “colonial office,” into Chinese. The opposite, of Chinese terms being used for Western concepts, also started to happen, so *fanbu* finally came to be seen as dependent as colonies, regardless of the actual facts. These dependencies or colonies came to be called *shudi* in contemporary Chinese.

Yet looking at the word *shudi*, the Chinese characters representing this word are similar to the previously mentioned *shuguo*. The characters and meaning also have things in common with

² (Map 1) Retrieved from the Library of Congress; (Map 2) Adapted from “Guafen” map in Okamoto Takashi, *Zoho: Chugoku “Han-Nichi” no Genryu* [Enlarged edition: The origins of anti-Japanese sentiment in China] (Chikuma Gakugei Bunko, 2019), p. 247; (Map 3) *Xinmin congbao* [Renewing the people], no. 1 (1902): cover.

fanshu, so when seen from the perspective of other countries, such as the Western powers and Japan, it appeared as if the *shudi* were no different from *shuguo*, and that the areas remained the same as before. In fact, the English translation for all of these words were the same: “dependencies.”

3. “Territorial Sovereignty”

During the final years of the nineteenth century and into the twentieth century, China's sense of crisis with regard to the country's partitioning by the Western powers reached its climax. Especially in the early twentieth century, the areas that were *fanbu* were caught between Russia in the north and British India in the south. The *fanbu* became a site of competition among the imperialist powers in the so-called Great Game. The Chinese devoted greater efforts to keep these areas inside China and prevent the *fanbu* from being taken by other countries.

We should pay special attention to 1905. Even before that year, calls for China to become a homogenous nation-state and to be unified, as if all of the Qing's territory was homogeneous and painted in one color, as shown in Map 3, had become extremely frequent among the Han Chinese. We might perhaps call this the start of nationalism. This was the result of going through the process depicted in Maps 1 to 3 of Fig. 2, during the decade after the Treaty of Shimonoseki in 1895.

At a time when such nationalism was growing, how could Tibet, Mongolia, and Xinjiang, called *shudi* or *fanbu*, be defined? It was then that the concept of “sovereignty” first appeared in Chinese political discourse. Other countries had previously used the term “suzerainty” in place of “sovereignty.”

Suzerainty is an unclear and ambiguous concept, but it was likely its ambiguity that gave it its versatility. All of the Qing's *shudi*, *shuguo*, and *fanbu* were given the same English designation of “dependency.” The meaning was simply that these areas were dependent, regardless of the actual facts, and this dependency was coupled with the concept of suzerainty. It must have been a convenient term for indicating a hierarchical relationship without having to consider the facts of the matter.

Yet at this late hour, leaving Tibet and Mongolia as they were risked having them suffer the same fate as the *shuguo*—Ryukyu, Vietnam, Burma, and Korea—which had also been perceived as dependencies. Han Chinese elites and officials came to fear not only the separation of these areas from China and their loss, but also that this might trigger the *guafen* of China proper. Suzerainty became insufficient as a safeguard, so the Chinese started invoking the concept of sovereignty instead.

If so, *fanbu*, *fanshu*, and *shudi* also became unusable terms since they were coupled with the concept of suzerainty. The Chinese needed a new lexical concept that could be paired with sovereignty and could replace *shudi*, but what could it be?

The answer was *lingtu*, the Chinese translation of “territory.” The word “territory” in Chinese was likely a legal concept that was formulated based on the Japanese *ryochi*, but the concept started to be used in China as well. The emergence of the concept of sovereignty neatly coincided with the rise of nationalism in China.

The concept of territory became widely known and established in 1911–1912, that is, during the 1911 Revolution, when the Qing Dynasty gave way to the Republic of China. The Provisional Constitution of the Republic of China states, “The territory of the Republic of China shall consist of twenty-two *xing-sheng* [provinces], Inner Mongolia, Outer Mongolia, Tibet, and Qinghai,” explicitly using the word “territory” and defining its extent. As part of this political transition, the concepts of “territory” and “sovereignty” in China came to be established with meanings similar to their modern-day usages.

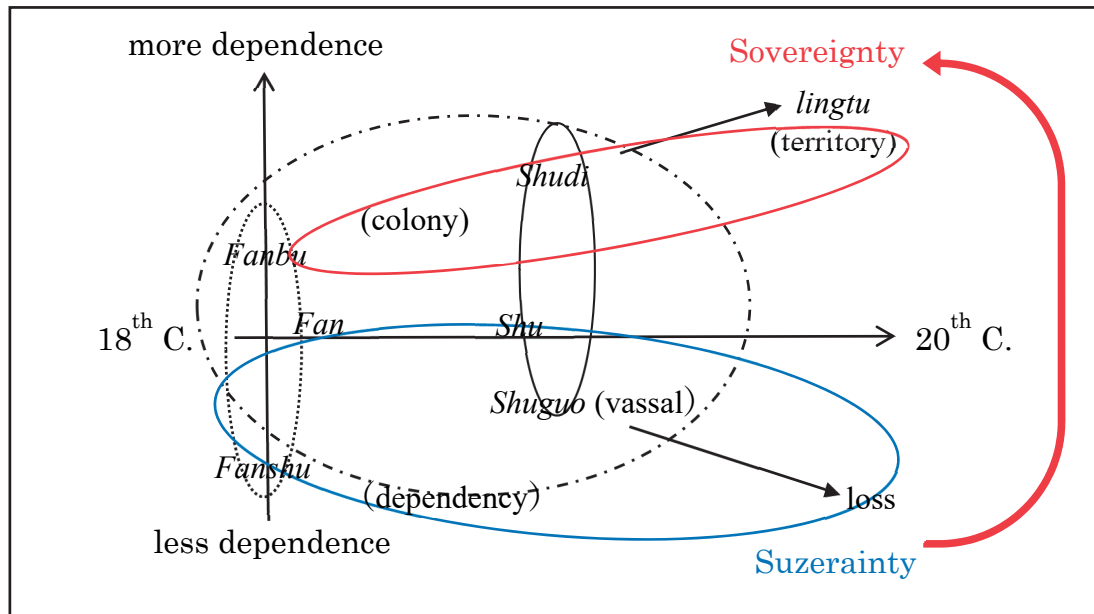


Fig. 3 Concept of "Territory": from *Fanshu/Shudi* to *Lingtu*³

Conclusion: The Origins and Development of "Territorial Sovereignty"

The roots of the Chinese concept of "territorial sovereignty" can be traced back to the concepts for tributaries or dependencies: *shudi* and *fanbu*. Moreover, these concepts can also be replaced by the word *fanshu*. Since the word *fanshu* was also used for lost *shuguo*, such as Korea, Vietnam, and Ryukyu, the fear of losing territory came to be embedded in the Chinese psyche from early on.

Territory is a concept that implies sovereignty. This is in line with conventional theory. However, the notion that territorial sovereignty is always at risk of being lost, must always be protected, and must never be yielded comes across as a very Chinese way of thinking.

The concept of "territory" in Chinese language started out as a designation specifically for Tibet and Mongolia, but it then became a concept applicable to other places because they were originally *fanbu* and *fanshu*.

³ Chart prepared by the author based on Okamoto, *Chugoku no tanjo*, p. 424, Figure 7.



Fig. 4 Chinese Nation in the Republican Era⁴

Fig. 4 is a map used in China during the Republican period. China's territory at the time is indicated in orange. There were nonetheless some maps in circulation that showed, inside a dotted line, lost territory that had to be recovered.

The historical process by which territory was lost can be said to have been imprinted in the Chinese understanding of the legal concept of “territorial sovereignty.” Since this is the starting point of some of the demands and claims of modern China, we might suspect that the roots of certain ongoing disputes can also be traced to this historical background.

⁴ Prepared by the author based on “Zhonghua guochi tu” [Map of Chinese national humiliation], *Zuixin Zhongguo ditu* [Most recent maps of China] (Dongfang yudi xueshe, 1938).

Debates Concerning the Incorporation of Peripheral Islands into the Territory of Japan*

Takai Susumu**

Abstract

Japan introduced international law when Japan ended the seclusion policy of the Edo period and started to interact with Western countries. Japan took measures to possess and establish title to peripheral islands on the basis of international law. The process by which peripheral islands in the Pacific, the Sea of Japan, the East China Sea, and the Sea of Okhotsk were incorporated into Japanese territory will be examined, and the objections of neighboring countries to some of these acquisitions will be discussed.

Introduction

Delimitation of the scope of a state's territory, as well as the acquisition and loss of territories are fundamentally made on the basis of international law. Since the country's opening to the global community in the mid-19th century, Japan has respected the principles of international law. Measures to incorporate islands near Japan into the country's territory were progressively implemented, based on the law of nations. However, disagreements over Japan's sovereignty over Takeshima, the Senkaku Islands, and the Northern Territories have been voiced by neighboring countries since the signing of the San Francisco Peace Treaty after World War II.

There are four types of territorial acquisition, according to the traditional precepts of international law. The first two are accretion and occupation, where territories are seized by a unilateral act of a state. In accretion, a state unilaterally acts to acquire territory by taking advantage of natural phenomena. A well-known example of accretion is New Nishinoshima Island, which is an island that became Japanese by appearing next to Old Nishinoshima Island in the country's territorial waters, through the natural phenomenon of an underwater volcanic eruption. In the case of islands on the high seas created by underwater eruptions, the new island becomes an unoccupied territory that belongs to no state, and can be possessed by the first state to lay claim to it.

The other type of acquisition involving unilateral acts of a state is known as occupation. Strictly speaking, there is a separate type of occupation known as prescription, but I will only explain occupation as it relates to Japanese island territories. Occupation is a unilateral act of a state whereby land categorized as *terra nullius*—meaning “nobody's land”—is incorporated into the state's territory. To be recognized under international law, the occupation must be of land that is recognized as belonging to nobody. It does not matter if the land is already inhabited. Simply discovering the territory is not recognized as an act of occupation, and effective control must be

* This article is based on a presentation made by the author at the symposium “Territory and Maritime Issues in East Asia and their Origins” held by JIIA, Doshisha University Center for Study of South China Sea and Faculty of Law Doshisha University on March 2, 2019.

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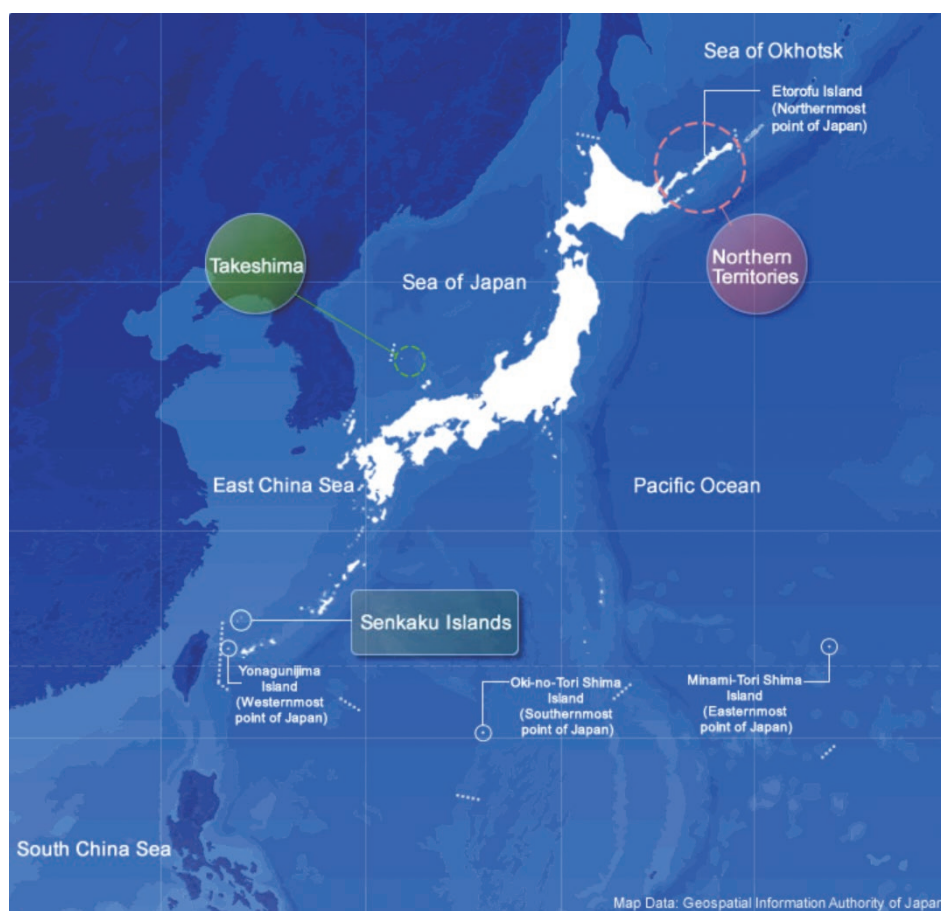
exercised over the territory so as to make clear the state's intention to take possession of it.

There are also two types of territorial acquisition that are based on a mutual agreement between states: incorporation and cession. Incorporation signifies the transfer of a territory in its entirety to a foreign state on the basis of a mutually agreed treaty. A famous example is the Japan-Korea Treaty of 1910, by which the state on the Korean peninsula was recognized as Japanese territory through a treaty that was agreed upon by the Korean and Japanese governments.

Cession is an act of territorial acquisition recognized in international law whereby part of a territory is transferred to another state, again by a mutual pact. This can be further divided into peacetime and wartime cession. Peacetime cession refers to the expansion of a state through the purchase or exchange of territory. In Japan's case, we have the 1875 Treaty of St. Petersburg by which Japan exchanged Karafuto (Sakhalin) Island for the Russian territory of the Chishima Islands (Kuril Islands).

Wartime cession refers to a mutual agreement on the transfer of territory in a peace treaty that ends a war. To legally terminate hostilities, a peace treaty that incorporates stipulations on territory must be signed. An example of this is the 1895 Treaty of Shimonoseki. As a result of the First Sino-Japanese War, the Qing territory of Taiwan was ceded to Japan and made a Japanese territory. The 1905 Treaty of Portsmouth was signed after the Russo-Japanese War, by which southern Sakhalin Island was transferred to Japan from Russia as a wartime cession of land that was valid according to international law.

The map shows the scope of Japan's territories. As Japan is surrounded by sea, the extent of its territory on land is small. However, its exclusive economic zones (EEZ) is the 11th biggest in



Scope of the Peripheral Islands Territory of Japan

(source: Ministry of Foreign Affairs of Japan, <https://www.mofa.go.jp/territory/index.html>)

the world. The existence of the Ogasawara Islands is why international law recognizes a vast EEZ for Japan. The EEZ is likely to become an economically promising area because of the wealth of underwater resources that have been discovered in the zone.

1. Acquisition of Island Territories in the Pacific by Occupation

The Ogasawara Islands

The Ogasawara Islands are island territory under the jurisdiction of Tokyo Metropolis that includes the Ogasawara Islands, the Volcano Islands, Okinotorishima Island, and Minamitorishima Island. According to the official website of Ogasawara Village, the Ogasawara Islands were so named because Ogasawara Sadayori landed on one of its islands and put up a wooden marker in 1593. He then reported what he had done to the Tokugawa Shogunate. The islands remained unoccupied and uninhabited for some time after this, but a great number of ships started coming here in the 1800s. Two Americans, a British person, an Italian, and a Dane settled here with some Kanakas from Hawaii in 1830. Commodore Matthew Perry of the U.S. Navy also landed here in 1853. It appears that many ships in distress drifted here around 1830, so that the islands became inhabited by people of different nationalities.

From the 1860s, Japanese people started colonizing and settling the islands in earnest, using the Ogasawara Islands as a waystation to the South Sea Islands. The Edo shogunate sent an inspection team to set up a provisional government office in 1862, and accepted immigrants from Hachijojima Island. Difficulties in the colonization process led all of the Japanese to be evacuated the following year. In 1876, the Japanese government enacted regulations that were to be enforced on the Ogasawara Islands, set up a government office on the islands, and notified the ambassadors of foreign countries in Tokyo that the Ogasawaras would be placed under Japanese jurisdiction.

Germany, France, the Netherlands, and Spain replied that they would abide by Japan's decision. The U.S. and Britain objected on grounds that their citizens had extraterritorial rights. Following exchanges of letters between the Japanese government and the two countries, they acknowledged the Japanese measures. The Ogasawara Islands became Japanese territory through occupation, on the basis of other countries' explicit or implicit acknowledgement of Japan's announcement that it was taking possession of the islands.

The Volcano Islands (Iwojima Island)

The Volcano Islands, also known as Iwojima Island, were known to Europeans since the 17th century and were left as an unoccupied territory possessed by no country. In 1889, Tanaka Eijiro and more than a dozen other settlers landed on the islands to fish and carry out sulfur mining. The cultivation of crops such as sugar cane, coca, and lemons later became the islands' main industry. In 1891, the Tokyo prefectural government requested the national government to make explicit its jurisdiction over the Volcano Islands to manage the Japanese who were there.

The central government named by imperial decree the three islands belonging to the Volcano Island chain Kitaiwo Island, Iwo Island, and Minamiwo Island. The islands were placed under the jurisdiction of the Ogasawara Island government of Tokyo Prefecture by a decision of the cabinet that was made public. There were no objections to the Japanese government's decision from other countries, so Japan acquired the three islands through occupation.

The number of permanent residents of the Volcano Islands subsequently rose to about 1,000. The outbreak of World War II led to the evacuation of the residents to mainland Japan in 1944. There exists a Japanese Maritime Self-Defense Force base on Iwojima Island, but none of the former residents have returned.

Okinotorishima Island

Twenty to thirty years ago, Okinotorishima Island used to be a much larger rock than it is today, but it has shrunk to become a small rock due to seawater erosion. Okinotorishima Island as identified as an islet called Parece Vela on sea charts from the 17th century, but was left as an uninhabited island in no country's possession. The Japanese government deemed Okinotorishima Island an unoccupied territory in July 1931 and placed it under the jurisdiction of Ogasawara Subprefecture by a notice from the Ministry of Home Affairs. There were no objections to the Japanese government's act from other countries, so Japan acquired Okinotorishima Island through occupation.

Seawater erosion caused Kitakojima Island and Higashikojima Island to become Okinotorishima Island's only reefs that were sticking out of the water at high tide. To prevent the submerging of the reefs, the government conducted conservation work on two occasions between 1987 and 1993.

Minamitorishima Island

Minamitorishima Island is located far from the Japanese archipelago and is Japan's easternmost island territory. In the 1860s, not only exploration ships but also whalers appeared in the waters around Minamitorishima Island, and a great number of ships recorded the existence of the uninhabited island that came to be called Minamitorishima Island.

Mizutani Shinroku, who drifted to Minamitorishima Island during a storm in 1896, saw that it was rich in resources, and so led 23 people from the Ogasawara Islands to settle on Minamitorishima Island and carry out business activities. As Mizutani made a request to lease the island from the Japanese government in 1898, the government decided to take possession of Minamitorishima Island and incorporated the island into Japanese territory by a notice from Tokyo Prefecture in July 1898. Japan took possession of Minamitorishima Island by occupation.

In 1902, Mizutani founded Mizutani Village, where about 60 Japanese settled and conducted activities such as collecting guano, carrying out taxidermy, and canning food. The island currently has no civilian residents. When Commodore Perry of the U.S. Navy came to the Ogasawara Islands, he recommended to his government that the U.S. should take possession of Minamitorishima Island. Since the U.S. government had no interest in Minamitorishima Island, it did not challenge Japan's territorial rights.

2. Acquisition of Island Territories in the Sea of Japan and the East China Sea

Takeshima

Takeshima in the Sea of Japan consists of the two islets Ojima Island and Mejima Island. Takeshima has been well known to Japanese people since the Edo period, when it was called Matsushima Island. West of Matsushima Island is Ulleungdo, which was then called Takeshima, and many records show that the Murakawa family and the Otani family of Tottori Domain made a fortune by developing the island after obtaining permits to travel there from the Edo shogunate. Matsushima Island was used as a place to disembark and rest on route to Ulleungdo.

The Korean government subsequently asked, via its Communication Envoys, the Edo shogunate to prohibit travel to Ulleungdo so that no Japanese could go there and develop the island. The shogunate was also informed of Korea's empty-island policy that kept Koreans from settling on Ulleungdo. The shogunate had adopted a seclusion policy, so it accepted the Korean request and prohibited Japanese from traveling to Ulleungdo. However, Matsushima Island was not subject to this travel ban.

A British ship "discovered" a non-existent island to the west of Ulleungdo in the latter half of the 18th century using unsophisticated surveying technology. The phantom island ended up

being marked on sea charts, leading to Western maps including three islands in the area: the non-existent island, Ulleungdo, and Matsushima Island. When Western maps were imported to Japan in the latter half of the 19th century, the non-existent island came to be called by the name of Takeshima and Ulleungdo started to be called by the name of Matsushima Island, which caused confusion.

In response to a request to lease Matsushima Island from Nakai Yozaburo in 1905, the Japanese cabinet decided in January 1905 that the Matsushima Island of the Edo period should be renamed Takeshima because Ulleungdo was called Matsushima Island by Japanese people at that time. The cabinet also decided that Takeshima should be listed in the register of state-owned land and placed under the jurisdiction of Shimane Prefecture. Nakai Yozaburo leased Takeshima from the government for 30 years and conducted activities such as gathering abalone and hunting sea otters.

With the outbreak of World War II, people stopped fishing around Takeshima. After the end of the war, in 1952, the South Korean president unilaterally proclaimed a maritime zone over which South Korea exercised sovereignty, arguing that Takeshima, or Dokdo in Korean name, was Korean territory.

The Japanese government protested the Korean moves. South Korea ignored the protest and illegally occupied Takeshima by force in 1954, and the island remains under South Korean occupation.

The Senkaku Islands

The Senkaku Islands in the East China Sea are a group of islands. Around 1885, the Japanese government ordered the navy to begin surveying the Senkaku Islands, and civilian exploration teams also landed on the Senkakus. When a man named Koga Tatsushiro asked to lease the Senkaku Islands in 1894, the government formally incorporated them into Japanese territory by occupation of *terra nullius* through a cabinet decision handed down in January 1895. This was done after it was verified that the islands were not under the control of the Qing dynasty or any other country. Koga and about 200 other people engaged in activities such as harvesting *yakogai* seashells, processing bonito, and catching albatross for their down. Following the 30-year lease period, the Senkaku Islands were sold to Koga Tatsushiro's son, Zenji, and became private land.

After World War II, the Senkaku Islands were placed under U.S. administration together with Okinawa in accordance with the San Francisco Peace Treaty. China protested against the United States action arguing that Okinawa, a part of the Japanese territories should not be administered by the United States. However, when the existence of oil deposits in the waters around the Senkaku Islands became known in 1969, China began asserting in 1970 that the islands were Chinese territory. The islands were returned to Japan in accordance with the 1972 Okinawa Reversion Agreement.

3. Acquisition of Island Territories in the Sea of Okhotsk through Mutual Consent

The Northern Territories

The status of the Islands and Sakhalin Island in the Sea of Okhotsk has been determined through the mutual agreement of Japan and Russia. Japan and Russia signed the 1855 Treaty of Commerce and Navigation, which drew up an international border between Urup Island and Iturup Island. The Russian czar believed his nation's territory extended to the southern tip of Urup Island. So the 1855 treaty had the effect of confirming an existing border rather than drawing up a new boundary.

The treaty did not draw up a border for Karafuto (Sakhalin) Island, and left the island under

joint Russo-Japanese control. The two nations later concluded the Treaty of St. Petersburg in 1875, which made the Kurils a Japanese territory and Sakhalin Island a Russian territory. Each state's territorial rights over the respective islands took shape through territorial exchanges, which were mutually agreed acts of the cessation of land in peacetime.

In 1905, the two countries concluded the Treaty of Portsmouth, which brought an end to the Russo-Japanese War. Japan acquired Sakhalin Island south of the 50th parallel through a mutually agreed act of cessation following the end of hostilities.

At around the end of World War II, about 400,000 Japanese lived on Sakhalin Island and about 17,000 on the Kuril Islands. The islanders enjoyed prosperous livelihoods. With the defeat of Japan in 1945, the Soviet Union advanced south along the islands from the Kamchatka Peninsula to Urup Island to disarm the troops stationed in the Japanese territory of the Kuril Islands. Meanwhile, troops were dispatched from Vladivostok to disarm Japanese soldiers on the Habomai Islands, Shikotan Island, Kunashir Island, and Iturup Island. Subsequently, the inhabitants of the four islands were forcefully deported to Hakodate in Hokkaido via Sakhalin Island. After the Japanese departure, Russians settled on the islands, and remain to this day.

4. Japan's Island Territories according to the San Francisco Peace Treaty

After Japan's defeat in World War II, the scope of the nation's territories was defined by the San Francisco Peace Treaty. With Japan's acceptance of the Allies' Potsdam Declaration, which stated the conditions for ending the war, World War II came to a close. The Potsdam Declaration declared that Japan's sovereignty and extent of its territories should be decided by the Allies, but at the same time, it stated that the Cairo Declaration would be upheld. The Cairo Declaration proclaimed that the Allies did not fight Japan with the aim of expanding their own territories, and that they would make Japan relinquish what it had obtained through "violence and greed." The Allies drew up the territorial clauses of the 1951 Peace Treaty on the basis of preceding texts.

The territorial clauses in Article 2 of the San Francisco Peace Treaty stipulated that Japan should recognize Korean independence and renounce all right, title, and claim to Korea; renounce all right, title, and claim to Taiwan and the Pescadores; and renounce the Kuril Islands and southern Sakhalin Island.

5. The Territorial Clauses in the San Francisco Peace Treaty and the Objections against Them

The Ogasawara Islands

The Allies' decision on the extent of Japanese claims to territorial sovereignty was made clear in the San Francisco Peace Treaty. Article 3 of the treaty stipulates that the Ogasawara Islands in the Pacific should be placed under a trusteeship, with the U.S. as the sole administrator. The Ogasawara Reversion Agreement was concluded between Japan and the U.S. in 1968, and the Islands were returned to Japan. The Ogasawaras marked the 50th anniversary of their reversion to Japan in 2018.

Takeshima

South Korea objected to how the San Francisco Peace Treaty treated Takeshima. Its argument was that Takeshima, or Dokdo in Korean name, has been a Korean territory since ancient times, and that it was part of Korean territory that was renounced by Japan in the San Francisco Peace Treaty. We should note here that South Korea was not a signatory to the treaty. It was later revealed that during the drafting of the agreement, a Korean ambassador to the U.S. had requested the United States to explicitly stipulate to include Dokdo as part of the Korean

peninsula that was to be renounced by Japan, but this request was rejected.

As part of their occupation policy, the Allies defined what came to be known as the MacArthur Line. The demarcation of the line was based on SCAPIN (Supreme Commander for the Allied Powers Instruction Note) 677 and 1033, which serve to narrow the Japanese scope of activities.

South Korea asserted that the Allies had acknowledged Takeshima as South Korean territory because it was on the South Korean side of the MacArthur Line. SCAPIN 677 and 1033 stated that the line had been temporarily set up as part of occupation policy, and specified that the line was not to be construed as being a final territorial determination, but South Korea ignored these caveats.

South Korea issued a proclamation on its maritime sovereignty in January 1952, just before the San Francisco Peace Treaty came into effect. This proclamation asserted that Dokdo, called Takeshima by Japan, was South Korean territory. The declaration drew up what was called the Syngman Rhee Line along the MacArthur Line, which was set to disappear once the occupation of Japan ended.

Japanese fishing boats started operating in the waters around Takeshima after World War II, but were seized by South Korean patrol ships one after the other. Japan strongly protested the seizures of Japanese fishing boats and asserted that Takeshima was Japanese territory, while strongly objecting to the South Korean Syngman Rhee Line. South Korean maritime police forcefully occupied Takeshima by force in 1954, and they remain to this day.

The Senkaku Islands

The Senkaku Islands were placed under U.S. trusteeship together with Okinawa in accordance with Article 3 of the San Francisco Peace Treaty, and it was returned to Japan in 1972 under the stipulations of the Okinawa Reversion Agreement. However, China asserts that the Senkaku Islands were discovered by China and so was part of Taiwan, which was renounced by Japan according to Article 2 of the San Francisco Peace Treaty.

In 2012, China announced that the Senkaku Islands are core interest. The core interests asserted by China are Chinese territories that are to be reclaimed, even if military force is required. Taiwan, Tibet, Xinjiang, and the South China Sea were identified as core interests in 2009. However, with the expansion of the core interests to include the Senkaku Islands in 2012, China set up the East China Sea Air Defense Identification Zone in the airspace above the Senkakus, announcing that all civil aircraft passing through the zone would be required to fulfill certain obligations.

The Japanese government purchased the privately owned Senkakus and made them state-owned in 2012. China strongly opposed what it perceived as a Japanese attempt to claim Chinese territory, and sent ships to patrol the waters around the islands and started to claim that they were policing fishing activities. Japan argued that it had simply bought the Senkaku Islands from private sector owners, but China continued to argue that Japan had stolen and nationalized Chinese territory. The situation remains deadlocked today.

The Northern Territories

The Soviet Union refused to sign the San Francisco Peace Treaty on grounds that the Northern Territories that were to be renounced by Japan, according to Article 2 (c) of the treaty, were not transferred to the Soviet Union. The Soviet Union's intention to acquire the Northern Territories as spoils of war through cessation did not work out. The three Allied leaders—British Prime Minister Churchill, U.S. President Roosevelt, and Soviet Premier Stalin—had signed the Yalta Agreement in February 1945. The agreement promised that the Kuril Islands would be handed over to the Soviet Union and that the USSR would regain control over Sakhalin Island after World War II. The Soviet Union asserted that the Northern Territories were a part of the Kuril Islands

and were Soviet because of the stipulations of the Yalta Agreement. The status of the Territories remains unchanged as of this day.

The Soviet Union and Japan subsequently agreed to a declaration that would end the state of war between the two states. Moscow aimed to end the war and secure the peace as quickly as possible, while Tokyo sought the swift return of Japanese soldiers interned in Siberia. The result was the Soviet-Japanese Joint Declaration of 1956. In this declaration, the Soviet Union promised to transfer the Habomai Islands and Shikotan Island to Japan as an expression of the goodwill of its people. After the conclusion of the Treaty of Mutual Cooperation and Security between the U.S. and Japan in 1960, the Soviet Union made the removal of U.S. military bases in Japan a condition for the return of Habomai Islands and Shikotan Island.

Prime Minister Shinzo Abe and President Vladimir Putin are engaged in diplomatic negotiations about the conclusion of a definitive peace treaty, taking into consideration that it is unprecedented to not have concluded such a treaty more than 70 years after the end of hostilities. Questions such as whether a peace treaty can even be concluded, whether the treaty will have clauses providing for the return of Habomai Islands and Shikotan Island, and whether the treaty will touch upon the return of Kunashir Island and Iturup Island are attracting attention.

As we have seen, Japan has come to possess island territories in accordance with international law. Japan's peripheral islands such as the Ogasawara Islands in the Pacific Ocean, the Senkaku Islands in the East China Sea, and Takeshima in the Sea of Japan have been incorporated into the country's territory after title was obtained through occupation under international law. The Northern Territories in the Sea of Okhotsk have been incorporated into Japanese territory by mutually agreed treaties. However, Russia and Japan have different interpretations of these treaties.

Territorial and Maritime Issues in East Asia and International Law*

Hironobu Sakai**

Abstract

International law legally governs territorial and maritime issues, and contributes to the peaceful settlement of such disputes. Those involving Japan in East Asia are no exceptions. In territorial issues, State parties to the disputes usually claim sovereignty over territories based on territorial title and the interpretation and application of the relevant treaties under international law. The mechanisms such as international adjudication, as well as the procedures to operate them, have been established so as to obtain legal solutions to territorial disputes. For maritime issues, the United Nations Convention on the Law of the Sea (UNCLOS), or other bilateral and multinational treaties, including those signed by Japan, China and South Korea, set out legal principles on the delimitation of maritime boundaries and rules on the development and management of fishing resources and mineral resources. International law provides codes of conduct and legal standards for dispute resolution among sovereign States, and contributes to the prevention and the peaceful settlement of disputes. Nevertheless, the roles of international law in the settlement of disputes are limited to the legal realm, thus having perspectives other than international law is important for a holistic resolution to disputes.

Introduction

In this article, I will identify the relevant rules of international law to territorial and maritime issues in East Asia, and discuss the roles of international law in the peaceful settlement of the disputes.

First, it is to be assured that the rules of international law for territorial issues are different from those for maritime issues. While in the territorial issues, sovereignty over territories and the delimitation of borders are typically the main areas of concern, and the rules of international law which governs such issues are required, the freedom of navigation, the preservation and development of biological and mineral resources, and the delimitation of maritime boundaries are some of the typical subjects in the maritime issues. Treaties and customary international law give further clarity to and confirm the contents of the relevant rules through the decisions by international courts and tribunals as well as state practice.

International law has substantive rules that regulate territorial and maritime issues, and also provides mechanisms and procedures for resolving disputes between States concerned. It is to be also paid attention to the procedural aspects of international law.

* This article is based on a presentation made by the author at the symposium “Territory and Maritime Issues in East Asia and their Origins” held by JIIA, Doshisha University Center for Study of South China Sea and Faculty of Law Doshisha University on March 2, 2019.

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I. Territorial issues and international law

1. Territorial title

International law on territorial issues traditionally has been considered to be the standards that determine which country has sovereignty over certain territories. The concept of territorial title is important to claim the sovereignty over the territory in question and to resolve territorial disputes. Title refers to the facts that are reasons or grounds for effective sovereignty over territories, and is generally considered to be obtained through the following means: occupation, accretion, cession, and prescription. Discovery and subjugation also used to be means of gaining title to land.

States involved in disputes sometimes claim historical title based on historical facts. In the South China Sea arbitration case between the Philippines and China, China's claims were based on historical facts and not historical title. China uses different terms carefully, dependent upon the context.

What is known as “effective occupation”—which technically does not serve as title—is particularly emphasized in international judicial and arbitral cases. The concept has originated in the arbitral award of the Island of Palmas case in 1928, a dispute between the Netherlands and the United States about the sovereignty over the Island of Palmas off the coast of the Philippines. The Tribunal also pointed out “the continuous and peaceful display of territorial sovereignty” as significant. The international courts and tribunals have attached importance to these concepts in territorial disputes.

In a territorial dispute, the parties to the dispute claim sovereignty based on titles, but quite often neither of party has full title to the territory. If a party has full title to territory, a dispute should not occur in the first place. If a dispute does occur, the territorial titles of the parties will be compared to determine which of the titles is more convincing. If none of them are convincing, what is ultimately emphasized in international adjudication is which party has demonstrated “the continuous and peaceful display of territorial sovereignty” mentioned above. *Effectivité*, a modern-day terms of this “continuous and peaceful display of territorial sovereignty,” becomes paramount in international adjudication.

2. Territorial disputes and international law

(1) Characteristics of international adjudication

If a territorial dispute arises, there will be negotiations between the States involved. Those States also may make use of third-party bodies, such as the International Court of Justice (ICJ) and international arbitral tribunals. Referring a dispute to international adjudication requires agreement among the States involved. The States have the freedom to choose the procedures for resolving disputes, and international courts and tribunals have jurisdiction only if they obtain the consent to their jurisdiction from all of the States that are involved. Moreover, the international community has no means to enforce judicial decisions or arbitral awards. Ultimately, the final settlement of disputes depends on agreement among the States involved.

(2) Procedural rules for territorial disputes

For the procedural aspects of the judicial or arbitral process, the principle of intertemporal law and the concept of critical date may play a major role to resolve disputes in international law.

Intertemporal law is a principle that a judicial fact must be appreciated in the light of law contemporary with it. The Award in the Island of Palmas case made a distinction between the creation of rights from the existence of rights, so that the act creative of a right might be subject to the law in force at the time the rights arise, and that the right and its continued manifestation shall follow the conditions required by the evolution of law.

The critical date refers to the time when a dispute occurred or when sovereignty over a territory appeared to be definitively determined. In the *Minquiers and Ecrehos* case, in which sovereignty over the islands was claimed by the United Kingdom and France, the ICJ decided in its 1953 judgment that in principle, only facts before the critical date were taken into consideration. Nevertheless, it is also pointed out in other judicial judgments that facts and actions after the critical date might be considered, depending on the peculiarities of the case.

3. Territorial issues in East Asia

Let us now outline territorial issues in East Asia, focusing on the ones Japan is involved in.

(1) Takeshima

The dispute over Takeshima between Japan and South Korea arose in 1952 when South Korea issued a declaration concerning maritime sovereignty, by which it announced the establishment of the Syngman Rhee Line delimiting its territorial waters, and Japan protested the declaration. If the critical date is defined as the date when a dispute occurred, or when sovereignty over a territory appeared to be determined, 1952 is the critical date for the Takeshima dispute.

What are the arguments put forward by Japan and South Korea? Japan says it has possessed Takeshima since before Japan's encounter with the West in the 19th century. Japan further argues that in 1905, it took steps to incorporate the islands into its territory and gave notice of the measures officially. Contrary to the claims by Japan, South Korea maintains that there is no dispute between the two countries. It argues that it had sovereignty over the Dokdo Islands (the name of the islands in Korea) before 1905, when Japan says it made the islands a part of its territory. South Korea further argues that Dokdo is included in the territories over which Japan abandoned its sovereignty under the San Francisco Peace Treaty.

If it is proved that the establishment of the Syngman Rhee Line was a challenge to Japan's sovereignty over Takeshima, no subsequent actions will affect the legal assessment of Takeshima by strictly applying the critical date to the legal situation, and a decision favorable to Japan may be handed down by arbitrating bodies.

(2) The Senkaku Islands

Japan argues that it incorporated the Senkaku Islands into its territory through an order of its cabinet in 1895. However, in 1971, Taiwan and the People's Republic of China officially and respectively claimed sovereignty over the Senkaku Islands. China drew up its law on territorial waters in 1992, by which it defined its territorial waters to include the Diaoyu Islands (the Chinese name for the islands) so as to make the islands Chinese territory.

Japan has consistently maintained its stance that there is no dispute over the Senkaku Islands. The legal grounds for Japan's claim of sovereignty over the Senkakus are that the islands were uninhabited and were incorporated into Japanese territory by way of occupation because they were previously *terra nullius*, and that it has effectively exerted control over the islands since then. China claims that the Diaoyu Islands have historically been part of China, and that the islands are Chinese territory because they are part of Taiwan, which Japan abandoned under the terms of the San Francisco Peace Treaty.

The Senkaku Islands are currently under effective control of Japan. If we consider that the critical date for the Senkakus is 1971, when China lodged its protest, Japan's effective occupation of the Senkaku Islands will be admitted as evidence that confirms the legal situation of the islands before the critical date. Japan's territorial rights over the Senkakus are likely to be confirmed by third-party organizations. The Senkaku Islands issue is actually about the resources in nearby waters, and is related to the maritime issues in East Asia that will be discussed later.

(3) Japan's Northern Territories

Japan and Russia have signed numerous agreements on the territorial issues between the two States, including those in the eras of Russian Empire and the Soviet Union. The interpretations of those treaties play a significant role to solve the territorial issues between them.

Article 2 (c) of the San Francisco Peace Treaty stipulates that Japan “renounces all right, title and claim” to the Kuril Islands. Japan argues that the geographical scope of the Kuril Islands that it has renounced consists of Urup Island and the islands to the north of Urup. Under this interpretation, Etorofu Island and the islands to the south of Etorofu are Japan's inherent territory under the 1855 Treaty of Commerce, Navigation and Delimitation signed by Japan and Russia. Japan claims territorial rights to Etorofu Island and the islands to the south of Etorofu. In this argument, the geographical scope of the Kuril Islands becomes an issue. Russia argues that the Soviet Union acquired sovereignty over the Four Northern Islands following Japan's unconditional surrender after the Second World War and the Soviet Union's occupation of the Kuril Islands. The 1956 Japan-Soviet Joint Declaration calls for the Habomai and Shikotan Islands to be handed over to Japan after a peace treaty is concluded. We await progress in negotiations between Japan and Russia.

II. Maritime issues and international law

1. Development of the law of the sea

(1) Post-World War II treaties and agreements

The law of the sea has a long history, and in particular, following World War II, it saw remarkable development. In 1945, U.S. President Harry S. Truman claimed the right to develop mineral resources in the coastal waters of the United States, and advocated the conservation of fisheries resources in its coastal waters. Truman's actions triggered the adoption of the 1958 Geneva Conventions on the Law of the Sea. Subsequently, an attempt was made to expand the 1958 Geneva Conventions on the Law of the Sea to create a new treaty appropriate for the times. In 1982, the United Nations Convention on the Law of the Sea (UNCLOS), often referred to as the “Constitution of the Sea,” was adopted after negotiations that ran for ten years. UNCLOS covers all areas that are governed by the law of the sea. It provides the basis for the present legal order in the oceans, and has provisions on the expansion of the jurisdiction of coastal States, including the establishment of continental shelves and exclusive economic zones (EEZs). UNCLOS further establishes a new regime for the seabed that considers the interests of the international community. In exchange for the expansion of the rights of coastal States and the creation of international systems of control, systems that are favorable to maritime powers, including a regime for regulating transit passage through international straits, have been introduced.

The important thing is that a diverse range of treaties of a universal character, as well as regional agreements, have been created under the auspices of UNCLOS in response to specific issues such as fisheries and the marine environment. A network of those treaties constitutes the present legal order in the oceans.

(2) Characteristics of the current regimes on the Law of the Sea

It is safe to say that in the development of the current regimes on the Law of the Sea, the focus has been placed on managing marine resources. There are three characteristics of the present legal order in the oceans. First, the sea is divided into multiple zones, and each zone is subject to the provisions of international law. In the past, the legal order in the oceans was divided into two spatial categories: territorial waters that are regarded as belonging to a coastal State, and the high seas, which do not belong to any particular country. At present, the legal order in the oceans is multi-pronged: EEZs, continental shelves, and the deep seabed, in addition to territorial waters

and the high seas.

Second, the jurisdiction of a coastal State has functionally differentiated in degree, depending upon the type of maritime zone. In territorial waters, the jurisdiction of a coastal State is all-encompassing. In EEZs and on continental shelves, the jurisdiction of a coastal State is limited to fisheries and mineral resources issues respectively.

Third, the present legal order in the oceans and the rules of the Law of the Sea are considered to be the result of the reconciliation of the interests of coastal States and the ones of sea power States. Thus, U.S. warships attempt freely to navigate the South China Sea and other areas to reaffirm the interests of sea power States with respect to coastal States.

(3) The delimitation of maritime boundaries and the evolution of case law

Resource management and allocation issues have given rise to questions of maritime delimitation, on which international law has established certain relevant rules through state practice and case law.

The 1958 Convention on the Continental Shelf stipulated that in cases where the same continental shelf is adjacent to the territories of two or more adjacent States, the boundary shall be determined by applying the principle of equidistance. Meanwhile, the ICJ's judgment on the North Sea Continental Shelf cases in 1969 took into consideration the arguments of West Germany, which would have been adversely affected by the strict application of the principle of equidistance. This decision emphasized the natural prolongation of the continental shelf and affirmed the application of equitable principles, under which the continental shelf should be divided equitably among the States concerned.

In 1982, it was provided under UNCLOS that agreement among States should be sought to achieve equitable solutions on questions of maritime delimitation. Subsequent cases saw clashes between two competing rules; the "equidistance-special circumstances rule" based on equidistance and median lines, with adjustments to be made for special circumstances, and the "equitable principles-relevant circumstances rule" to take into account relevant circumstances so as to bring about an equitable result. Ultimately, the two rules were combined, and in the ICJ judgment on the Maritime Delimitation in the Black Sea case in 2009, a three-stage approach was adopted. In this approach, first, a tentative equidistance line is drawn. Second, the line is then adjusted so that it will lead to an equitable result. Finally, the proposed solution is examined to determine if there is any marked disproportionality between the length of the parties' relevant coasts and the maritime zones that will belong to them. The three-stage approach is used in maritime delimitation cases handled by the International Tribunal on the Law of the Sea and in cases that are referred to arbitration since then.

2. Maritime issues in East Asia

(1) Fisheries issues

After a period of worsening relations following the establishment of the Syngman Rhee Line, Japan and South Korea signed a fisheries agreement in 1965, which allows each country to create an exclusive fishery zone up to 12 nautical miles from its shores. In accordance with the new legal order in the oceans following the adoption of UNCLOS, a new Japan-South Korea Fisheries Agreement was signed in 1998, which is valid up to the present.

Japan and China signed a fisheries agreement in 1975 following the normalization of diplomatic relations in 1972. An updated Japan-China Fisheries Agreement that complied with UNCLOS was signed in 1997. Under the agreement, the two countries established provisional maritime zones and have been taking steps to conserve and manage living marine resources.

The relationship between Japan and Taiwan is interesting. Since they have no diplomatic relations, they cannot enter into any treaties. In 2013, the Japan-Taiwan Fisheries Agreement was

concluded between private entities close to each government, under which maritime zones have been established off their coasts.

(2) Continental shelf

The mineral resources of continental shelves are also developed and managed under agreements between States concerned. Japan and South Korea signed an agreement on the continental shelf in 1974 and established a joint development zone to the south of the Korean peninsula. The continental shelf in the East China Sea between Japan and China is problematic. The parts claimed by Japan and China overlap. Japan argues that an equidistance line should be drawn, while China claims that its sovereignty extends to the Okinawa Trough, based on the principle of the natural prolongation of the continental shelf. As discussed earlier, a three-stage approach has been adopted in recent maritime delimitation cases, and going by this approach, the continental shelf that China claims may be too large.

(3) Extended continental shelves

According to the definition of the continental shelf in UNCLOS, a coastal State can extend its sovereign continental shelf beyond 200 nautical miles from the baseline if certain conditions are met. To establish an extended continental shelf beyond 200 nautical miles, the coastal State needs to submit an application with the required data to the Commission on the Limits of the Continental Shelf (CLCS)—an organ provided for in UNCLOS.

Japan submitted in 2008 its claim of an extended continental shelf spanning seven maritime zones, including around Okinotorishima. China and South Korea objected to the claim, saying that Okinotorishima is not an island and should not have any continental shelf and nor EEZ. In 2012, the CLCS made a recommendation to Japan that admitted the nation's claim of an extended continental shelf, except for a zone to the south of Okinotorishima. The issue of an extended continental shelf is closely related to the legal status of Okinotorishima.

(4) The definition of an island: Is Okinotorishima an island or a rock?

Okinotorishima is an island at the southernmost tip of Japan. It is about 1,700 kilometers south of Tokyo and is made up of coral reefs. Its circumference is 10 kilometers. It is 4.5 kilometers long from east to west and as much as 1.7 kilometers long from north to south. Two tracts of land appear above sea level at full tide.

Japan argues that Okinotorishima is internationally recognized as an island, and that it is an island according to the definition in UNCLOS. China and South Korea argue that Okinotorishima does not fall into the category of islands according to the UNCLOS definition.

This issue is related to the interpretation of Article 121 of UNCLOS, which is also one of the subjects in the South China Sea arbitration case between the Philippines and China. The salient feature of the interpretation of Article 121 in the arbitral award is the following: the tribunal did not attempt to define what was a rock, and its award considered the purpose of EEZs when interpreting Article 121, while omitting considerations about state practice. The effects of the arbitral award on future state practice may become an issue. The award may also affect whether Okinotorishima should be considered an island or a rock.

Conclusions

There are four conclusions we can draw from this discussion. First, international law regulates both territorial and maritime issues. Second, the roles of international law in territorial and maritime issues are to provide codes of conduct to sovereign States and other entities so as to encourage them to behave according to rules, and to provide standards for resolving disputes that may arise. Third, tasked with such roles, international law brings stability to the

international community and to regional communities, which will in turn be reflected in the further development of international law. Fourth, international law touches only on the legal aspects of disputes. Thus, for a holistic resolution to disputes, we need various other standards and perspectives in addition to international law.

The Use of Force in Maritime Security and the Use of Arms in Law Enforcement under the Current Wide Understanding of Maritime Security

Atsuko Kanehara*

Abstract

This paper examines maritime security, by reconsidering the distinctions between the use of force prohibited by international law and the use of arms in law enforcement. The difference between the use of force prohibited by law and the use of arms accompanying law enforcement is difficult but extremely important, due to current strong tendency to understand maritime security widely. With a presupposition that the nature of acts or measures, in principle, decides the nature of the use of force or arms used in the acts or measures, first, this paper reviews the discussion regarding the concept of “the use of force” under Article 2, Paragraph 4 of the UN Charter. Then, the relevant jurisprudence will be introduced, followed by an examination of use of arms that is not prohibited by international law. Consulting the relevant provisions under UNCLOS, it can be said that there exists two types of the use of weapons; “the use of force” defined by and prohibited by international law, and “the use of arms” defined and permitted by international law that provides for law enforcement at sea. Examining the wide understanding of maritime security within the recent scholarly writings and Japanese legislative acts, this paper finds the distinctions between the security or military acts and law enforcement flexible. Law enforcement measures at sea will be undoubtedly expected to fulfil more functions than ever in order to avoid the escalation of the situations concerned. Thus, this paper emphasizes that the critical point is not to allow such use of weapons to seriously undermine the solidly established principle of the prohibition of the use of force.

Introduction

This paper will deal with the issue of maritime security. The focus is mainly placed upon the two recent discussions in the law of the sea: first, a wide understanding of maritime security;¹ second, the relationship between the use of force prohibited by international law and the use of arms accompanying law enforcement measures.²

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¹ Typical examples are as follows. D. Guilfoyle, “Maritime Law Enforcement Operations and Intelligence in an Age of Maritime Security,” *International Law Studies*, U. S. Naval War College, 93 (2017), 298 *et seq.*; N. Klein, *Maritime Security and the Law of the Sea*, (Oxford: Oxford University Press, 2011) A. Kanehara, “Japan’s Ocean Policy and Free and Open Indo-Pacific Strategy,” Lectures Delivered 25 through 29 of September, 2018, in India, Bangladesh, and Sri Lanka, https://www.in.emb-japan.go.jp/itpr_en/00_000740.html; https://www.bd.emb-japan.go.jp/itpr_en/PR20180927.html; https://www.lk.emb-japan.go.jp/itpr_en/00_000678.html, visited 10 April, 2019. Other works will be introduced at appropriate places in this paper.

² There are many works on this issue. See, for instance, T. Ruys, “The Meaning of ‘Force’ and the Boundaries of the Jus Ad Bellum: Are ‘Minimal’ Uses of Force Excluded from UN Charter Article 2

These two issues are closely related to each other in the following way. The possible distinction has been considered by scholars between the use of force prohibited by international law and the use of arms³ that is not prohibited by international law.⁴ As for the latter, mainly the use of arms for the purpose of effective law enforcement measures is principally presupposed.⁵ Under this state of discussion, due to the current strong tendency to understand maritime security widely, the distinction is more and more difficult to make but extremely important.

Thus, in this paper, the possible distinction will be reconsidered between the use of force prohibited by international law and the use of arms permitted by international law under the wide reformulation of the concept of maritime security.

To make the arguments in this paper precise, an explanation of the presupposition adopted by this author is needed.

Theoretically, there exist two issues to be examined: first, the nature of the acts or measures⁶ that are either military acts⁷ or law enforcement measures in conjunction with which force or arms are used; and second, the nature of the use of force or arms in conjunction with those acts or measures. It is very difficult to answer whether there may be any difference between the nature of the acts or measures, on the one hand, and the nature of the use of force or arms in conjunction with those acts or measures, on the other hand. To put this differently, it is questioned whether the nature of the acts or measures necessarily determines the nature of the use of force or arms accompanying those acts or measures.

A case is imagined in which, while the acts or measures have the nature of law enforcement, the use of arms in the situations holds the nature of the use of force that is likely accompanying military acts, and that is prohibited by international law.⁸ Vice versa, it might be possible that,

(4)?," *American Journal of International Law*, 18 (2014), 159–210; T. Ruys and S. Verhoeven, "Attacks by Private Actors and the Right of Self-Defense," *Journal of Conflict & Security Law*, 10 (2005), 193–206; P. J. Kwast, "Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the Guyana/Suriname Award," *Journal of Conflict & Security Law*, 13 (2008), 49–91; O. Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Oxford: Hart Publishing, 2010); R. McLaughlin, "Authorizations for Maritime Law Enforcement Operations," *International Review of the Red Cross*, 98 (2) (2016), 465–490; K. Morikawa, "Kokusai Heiwakyoryoku Gaiko no Ichi Danmen—Kaijo Soshikodo he no Sanka/Kyoryoku wo Meguru Hoteiki Shomondai [An Aspect of Diplomacy for International Cooperation and International Peace—Legal Issues with Respect to Participation in and Cooperation for Maritime Interdiction Operations]," *Nihongaiko to Kokusaihankei* [Japan's Diplomacy and International Relations], (Tokyo: Naigai Shuppan, 2009), 243–282; by the same author, "Gurei Zone Jitai Taisho no Shatei to Sono Hoteiki Seishitsu [Coping with Grey Zones and Its Legal Implications]," *Kokusai Mondai* [International Affairs], No. 648 (2016), 29–38; by the same author, "Kaijo Hoshikko ni Tomonau 'use of force' no Gainen [The Concept of the Use of Force in Conjunction with Law Enforcement]," in *Kokusaiho no Dainamizumu* [Dynamism in International Law], in Memory of Professor Akira Kotera, (Tokyo: Yuhikaku, 2019), 651–677.

³ Later in this **Introduction**, the terminology of "the use of force" and "the use of arms" will be defined. "The use of weapons" means physical uses of weapons.

⁴ See, Ruys, *op. cit.*, *supra* n. 2, 171–188 and the citations thereto.

⁵ For instance, see, Kwast, *op. cit.*, *supra* n. 2.

⁶ The context in which the acts or measures are conducted or taken may be called "situations." To avoid confusion, solely at appropriate places, the term "situations" will be used.

⁷ Typically the acts or measures are considered in which the use of force under Article 2, Paragraph 4 of the UN Charter is expected.

⁸ In particular, when the scale of the use of weapons decides the nature of it, namely whether the use of force prohibited by international law, or the use of arms in conjunction with law enforcement measures, the nature of the acts or measures as law enforcement does not necessarily determine the nature of the use of weapons as the use of arms accompanying the law enforcement measures. This is because the use of weapons in connection with law enforcement measures could be defined as the use of force

while the acts are regarded as military acts, the use of weapons in connection with the acts is regarded as the use of weapons that has a different nature from the use of force that is expected in military acts, and that is prohibited by international law, unless justified as an exercise of the right of self-defense.

While this question will be succinctly touched upon at an appropriate place, “in principle,”⁹ this author presupposes that the nature of the acts or measures decides the nature of the use of force or arms in the acts or measures.¹⁰ The use of arms in the context of law enforcement has the nature of the use of arms accompanying the law enforcement measures concerned. The use of force in conjunction with military acts bears the nature of the use of force that is assumed typically by Article 2, Paragraph 4 of the UN Charter with possible justification as an exercise of the right of self-defense against violent aggression.¹¹

By adopting this presupposition, two arguments will be clearly formulated. One is the argument on the nature of the acts or measures and the use of force or arms in conjunction with the acts or measures. The other is the argument on the logic according to which the distinction is made between military acts and law enforcement measures, on the one hand, and the use of force, in military acts and the use of arms accompanying law enforcement measures, on the other hand.

Under this presupposition, in order to determine the nature of the use of force or arms in acts or measures, the decision of the nature of the acts or measures becomes critically important. The nature of the acts or measures, either military acts or law enforcement measures, in principle, defines the nature of the use of force or arms in the acts or measures concerned.¹²

It is precisely in this context that the discussion of the definition of law enforcement¹³ demonstrates its significance. If acts or measures are regarded as those of law enforcement in accordance with the definition, the use of weapons in the acts or measures, in principle, has the nature of the use of arms accompanying law enforcement measures. Certainly, the same holds true with military acts and the use of force in connection with military acts.

According to this line of argument, the structure of this paper is as follows.

First, the discussion will be reviewed regarding the concept of “the use of force,” particularly, the meaning of “force” under Article 2, Paragraph 4 of the UN Charter. For instance, it is questioned whether “the use of force” at a minor scale should be prohibited by the provision. There may be some uses of “force” that do not fall within the purview of the provision and, therefore, that are not prohibited by the provision.¹⁴

prohibited by international law rather than the use of arms accompanying law enforcement measures, if the scale of the use of weapons reaches some designated scale. As explained later, this paper does not take such a position.

⁹ The qualification of “in principle” means that the consideration of the relevant factors in deciding in each case the nature of the use of force or the use of arms is not excluded.

¹⁰ As seen later, the theoretical distinction between the two issues is helpful also in analyzing the relevant jurisprudence.

¹¹ Kwast seems to take the same position as that of the presupposition set by this paper, although she does not clearly recognize the distinction between the two issues: the nature of the acts or measures, and the nature of the use of force or arms in connection with the acts or measures concerned. Kwast, *op. cit.*, *supra* n. 2, 62.

¹² While this paper focuses on the use of arms in conjunction with law enforcement measures, certainly, this holds true with military acts and the use of force in the military acts.

¹³ The definition of law enforcement will be examined later in this paper with its inherent importance in accordance with the line of argument adopted by this paper.

¹⁴ Actually, the discussion of the use of force prohibited by international law and that permitted by international law has been frequently conducted as the issue of the meaning of “force,” the use of which is prohibited by Article 2, Paragraph 4 of the UN Charter. In other words, in the discussion, the

To make the examination simple, the focus will be placed on the use of force, and the issue of threat by the force will be set aside for the time being.

Article 2, Paragraph 4 of the UN Charter is firmly recognized as reflecting customary international law. For this reason, the distinction between the provision and customary international law does not maintain very much meaning.¹⁵ Therefore, in this paper, the expression will be used, such as the use of force prohibited by “international law,” as far as it is not inappropriate.

Second, the relevant jurisprudence will be briefly introduced with respect to the distinction between the use of force prohibited by international law and the use of arms accompanying law enforcement measures taken at sea. The cases are the *M/V Saiga* Case (No. 2), the Fisheries Jurisdiction Case, and the Guyana and Suriname Case.¹⁶ They are all cases in the field of the law of the sea.

Third, the use of weapons that is not prohibited by international law will be focused on. The examination is conducted as that of the nature of the acts or measures in which weapons are used, as, according to the presupposition set by this paper, the nature of the acts or measures, in principle, determines the nature of the use of force or arms in conjunction with the acts or measures concerned. International law “positively” permits a certain category of the use of force or arms. It is different from admitting some room for the use of force or arms as being only “negatively” reflecting the non-prohibition by international law. It is necessary to legally define the nature of such use of force or arms.

For the analysis of the definition or the legal nature of the use of force or arms, a useful method is to consult the relevant provisions of international law. As this paper focuses on the distinction between the use of force prohibited by international law, and the use of arms for the purpose of effective law enforcement, principally the provisions regarding law enforcement at sea are relevant. Looked at from this perspective, the United Nations Convention on the Law of the Sea (UNCLOS) contains several important provisions.¹⁷

By consulting the relevant provisions under UNCLOS, it will become possible to define the use of arms accompanying law enforcement measures. As a result, there exist two types: “the use of force” defined and prohibited by international law, and the use of arms defined and permitted by international law that provides for law enforcement at sea. Such definitions set forth the logic or the legal frameworks under which the distinction is made between “the use of force” and “the use of arms.”¹⁸

definition and nature have not been sufficiently discussed with regard to the use of weapons that is not prohibited or even permitted by international law. This point will be explained later.

¹⁵ Here is not the place to examine the difference between Article 2, Paragraph 4 of the UN Charter and customary international law in detail as was questioned in the Nicaragua Case. Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986, *ICJ Reports* 1986, para. 191.

¹⁶ There are other incidents in which the use of weapons raised the issue of its legality, such as the *S. S. “Im Alone”* Case and “*The Red Crusader*” Case. As for the dealing with of these cases in the *M/V Saiga* Case (No. 2), see, Kwast, *op. cit.*, *supra* n. 2, 56–57. The *M/V Saiga* (No. 2), (Saint Vincent and the Grenadines v. Guinea), the International Tribunal for the Law of the Sea, Judgment (Merits) of 1 July 1999, *International Legal Materials*, 38 (1999), 1323. The citations for the Fisheries Jurisdiction Case and the Guyana and Suriname Case will be introduced at appropriate places.

¹⁷ There are other provisions that touch upon law enforcement at sea, such as those in the four 1958 Geneva Conventions on the Law of the Sea. Many of them are incorporated into UNCLOS, at least in terms of their substance, and they have come to gain the status of customary international law. Thus, the examination of the relevant provisions of UNCLOS may hold true with the customary international law that deals with the same matters.

¹⁸ The logic or legal frameworks for making the distinction between the use of force prohibited by

Fourth, the wide understanding of maritime security will be confirmed within the recent scholarly writings and Japanese legislative acts. In this context, succinct examination is necessary regarding the concept of so-called “grey zones.”¹⁹

Fifth, this paper will reconsider the distinction between the use of force prohibited by international law and the use of arms accompanying law enforcement measures under the wide understanding of maritime security.

As for the terminology, the following clarification is necessary to avoid confusion.

First, the term “law enforcement” is used rather than the special parlance to describe measures taken at sea.²⁰

Second, the expression “situations” will be used in a limited manner. There are “military situations” when the use of force prohibited by international law is expected in military acts.²¹ The situations in which law enforcement measures are to be taken are called “law enforcement situations.” The nature of “situations” is always the same as that of the acts or measures to be conducted or taken in the situations.²²

Fourth, different from the physical expression of a use of weapons, according to the relevant international law rules, “the use of force” and “the use of arms” obtain legal connotations.²³ When the use of weapons is discussed under the framework of the relevant international law that prohibits the use of force, the established expression “the use of force” will be used. The use of force connotes a legal meaning as a legal term.²⁴ This is because the term of “the use of force” or simply “force” is made part of Article 2, Paragraph 4 of the UN Charter and the customary international law that prohibits the use of force.

In the same way as the phrase “the use of force” acquires its legal connotation, after the relevant international law rules are identified that decide law enforcement, the use of arms exercised in law enforcement measures defined by the international law rules will gain the legal connotation.²⁵

In order to avoid redundant repetition, when no confusion is expected, “the use of force” is used as meaning the use of force prohibited by international law, and “the use of arms” as meaning the use of arms accompanying (or, in conjunction with, and in connection with, etc.), law

international law and the use of arms in conjunction with law enforcement measures would be blurred in facing the wide understanding of maritime security and the argument on the so-called “grey zones.” This critical point will be elaborated upon later in this paper, when it considers the possible impact by the wide understanding of maritime security on the distinction between the use of force prohibited by international law, and the use of arms accompanying law enforcement measures.

¹⁹ The term “grey zones” has different meanings. In this paper, the term “grey zones” particularly means that which exists between military acts and law enforcement measures.

²⁰ There is special parlance in the law of the sea, such as the right to approach, the right to recognize the nationality of vessels, and the right to visit (boarding inspection). This paper uses the generic and general term “law enforcement.”

²¹ To describe such situations, aggression, invasion into territories of foreign States, and the right of self-defense are the typical terms to use. However, it is not always easy to make the distinction between concrete acts and the context in which acts are conducted. Therefore, the distinction between “acts or measures” and “situations” indispensably becomes a relative one.

²² Although it is not clearly demonstrated, Kwast seems to take the same position as that of this paper. Kwast, *op. cit.*, *supra* n. 2, 63.

²³ “Forcible acts” and violence also mean acts with weapons. This paper will use the physical expression of a use of weapons.

²⁴ As discussed next, “force” becomes a legal term to be defined by international law, which principally Article 2, Paragraph 2 of the UN Charter represents.

²⁵ With this explanation, hereinafter, the phrase “the use of arms” will be used in this sense.

enforcement measures.

1. The Discussion of the Use of Force That is Prohibited by International Law

(1) The force under Article 2, Paragraph 4 of the UN Charter

As a starting point to examine the distinction between the use of force in military acts and the use of arms accompanying law enforcement measures, a review of the discussion of the meaning of “force” is useful. While the discussion regarding the “force” under Article 2, Paragraph 4 of the UN Charter does not clearly demonstrate the recognition of the two issues, namely, that of the nature of military acts and that of the nature of the use of force in military acts, it seems to be a discussion on military use of force in military acts.²⁶ Bearing this in mind, the following confirmation of the relevant discussion suffices here.

Regarding the “force” under Article 2, Paragraph 4 of the UN Charter, there are two opposite opinions.²⁷ One admits room mainly for the use of force at a small scale under the provision.²⁸ The other denies such room.²⁹ The reason for the denial of the room mainly for the use of force at a small scale is to avoid the abuse of such room and lack of established international practice.³⁰

According to the widely recognized interpretation of the provision, economic coercion and the use of arms or weapons between parties not in their international relations are not the use of force prohibited by the provision.³¹

(2) The use of force that is not prohibited by international law

The position that there is room for the use of force at a small scale under Article 2, Paragraph 4 of the UN Charter introduces the following examples: the abduction of Mr. Eichmann from the territory of Argentina; violations of territorial airspace by military aircraft; targeted killing of suspects of terrorism in the territory of a foreign country.³²

With respect to these examples, the opposite position argues that the lack of mention by other States of the use of force prohibited by international law on the occasions of these cases does not guarantee the establishment of international practice to admit the room for such use of force.

Here is not the place to make a thorough examination of these arguments. It is not easy to derive a definite conclusion as to whether Article 2, Paragraph 4 of the UN Charter is “all inclusive” or not. For the discussion in this paper, the recognition of the following two points is significant.

First, there is not generally an agreed position with respect to the meaning of force under Article 2, Paragraph 4 of the UN Charter. Second, if the existence of the use of force (a physical use of weapons) that is admitted by the provision is presupposed, an explanation of the nature of

²⁶ The presupposition set in the **Introduction** requires the distinction between the two issues. In this line of argument, in the following **Sections (2.–)** law enforcement and the use of arms in conjunction with law enforcement measures will be dealt with.

²⁷ Ruys, *op. cit.*, *supra* n. 2, 1 and citations thereto.

²⁸ A typical work is that of Corten, Corten *op. cit.*, *supra* n. 2, 55 and 77. Other examples of the use of force that may be permitted under Article 2, Paragraph 4 of the UN Charter, *ibid.*, 55 and 85.

²⁹ When room is discussed for some type of “force”, the term “force” connotes a physical use of weapons rather than “the use of force” as legal expression.

³⁰ Ruys, *op. cit.*, *supra* n. 2, 1, 163–171. In addition, according to Ruys, in a State-to-State context, even confrontation at a small scale comes within the ambit of the *jus ad bellum*. *Ibid.*, 171–187.

³¹ These points are confirmed by Ruys, *ibid.*, 63.

³² See the examples given by Ruys with reference to the threshold set by Corten to determine the use of force prohibited by Article 2, Paragraph 4 of the UN Charter, *ibid.*, 167–179.

such use of force or a definition of it will be required.

Very importantly, these two points lead to an approach that is separate from the definition of the use of force under Article 2, Paragraph 2 of the UN Charter. As a sort of “other side of the coin” argument, while the precise definition of the use of force is difficult, the definition or the nature of the use of force (a physical use of weapons) that is not prohibited or is allowed by international law can be sought.³³

Mainly, a use of weapons that is allowed by international law is discussed in conjunction with law enforcement measures.³⁴ In order to begin the consideration, succinct analysis of the relevant jurisprudence is helpful.

2. The Jurisprudence That Admits Some Distinction between the Use of Force Prohibited by International Law and the Use of Arms Accompanying Law Enforcement Measures

(1) The *M/V Saiga* Case (No.2)³⁵

The judgment rendered by the International Tribunal for the Law of the Sea (ITLOS) reads:

In considering the force used by Guinea in the arrest of the *Saiga*, the Tribunal must take into account the circumstances of the arrest in the context of the applicable rules of international law. Although the Convention does not contain express provisions on *the use of force in the arrest of ships*, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law. These principles have been followed over the years in *law enforcement operations at sea* (emphasis added).³⁶

(2) The Fisheries Jurisdiction Case³⁷

In the judgment the International Court of Justice (ICJ) said at paras. 81–84:

81. The Court notes that, following the adoption of Bill C-29, the *Coastal Fisheries Protection Act* authorized protection officers to board and inspect any fishing vessel in the NAFO Regulatory Area and “in the manner and to the extent prescribed by the regulations, use force that is intended or is likely to disable a foreign fishing vessel,” if the officer “believes on reasonable grounds that the force is necessary for the purpose of arresting” the master or crew (Section 8.1) (emphasis added)....

82. *The Coastal Fisheries Protection Regulations Amendment of May 1994* specifies in further detail that force may be used by a protection officer under Section 8.1 of the Act only when he is satisfied that boarding cannot be achieved by “less violent means reasonable in the circumstances” and.... These limitations also bring the authorized use of force within the category familiar in *connection with enforcement of conservation measures* (emphasis added).

84. For all of these reasons the Court finds that the use of force authorized by the Canadian

³³ A similar position is taken by Morikawa, *op. cit.*, *supra* n. 2 (Kaijo Hoshikko...), 661.

³⁴ *Ibid.*; Kwast, *op. cit.*, *supra* n. 2; K. Zou, “Maritime Enforcement of United Nations Security Council Resolutions: Use of Force and Coercive Measures,” *International Journal of Marine and Coastal Law*, 26 (2011), 235–261.

³⁵ *Op. cit.*, *supra* n. 16.

³⁶ *Ibid.*, paras. 155–156, and 159.

³⁷ The Fisheries Jurisdiction (Spain v. Canada), Judgment (Jurisdiction) of 4 December 1998, *ICJ Reports* 1998, 432.

legislation and regulations falls *within the ambit of what is commonly understood as enforcement of conservation and management measures* and thus falls under the provisions of paragraph 2 (d) of Canada's declaration. This is so notwithstanding that the reservation does not in terms mention the use of force. Boarding, inspection, arrest and minimum use of force for those purposes are all contained *within the concept of enforcement of conservation and management measures* according to a "natural and reasonable" interpretation of this concept (emphasis added).³⁸

(3) The Guyana and Suriname Case³⁹

The award given by the arbitral tribunal reads:

The Tribunal accepts the argument that in international law force may be used in *law enforcement activities* provided that such force is unavoidable, reasonable and necessary. However in the circumstances of the present case, this Tribunal is of the view that the action mounted by Suriname on 3 June 2000 seemed more akin to a threat of military action rather than a mere *law enforcement activity* (emphasis added).⁴⁰

(4) The recognition of the category of the use of arms in connection to law enforcement measures

In the jurisprudence introduced here, it is clearly confirmed that it has recognized the category of the use of arms accompanying law enforcement measures. It seems that this recognition is based upon the nature of the acts or measures in which the arms were used. Nonetheless, as is elaborated upon later, the courts and the tribunal did not clearly demonstrate the two issues, namely the issue of the nature of the acts or measures, and the issue of the nature of the use of weapons in the context of the acts or measures concerned.

With this reservation, the indication derived from the jurisprudence will be further examined later.

(5) The issue of the jurisdiction of the ITLOS and the arbitral tribunals established under Annex VII to UNCLOS⁴¹

As a closely related issue to the examination thus far, there is the issue of the jurisdiction of the ITLOS and the arbitral tribunals established under Annex VII to UNCLOS. Also, the issue of the applicable laws is practically connected in the jurisprudence to the issue of jurisdiction.⁴² This issue is not necessarily directly related to the examination of this paper. However, it is helpful to consider it to analyze the jurisprudence.

The ITLOS and the arbitral tribunals have jurisdiction over disputes concerning the interpretation or application of UNCLOS.⁴³ According to Article 293 of UNCLOS the court and

³⁸ *Ibid.*, paras. 81–84.

³⁹ In the Matter of an Arbitration between Guyana and Suriname, in the Award of 17 September 2007.

⁴⁰ *Ibid.*, para. 445.

⁴¹ This issue does not apply to the ICJ, in considering that it has "general" jurisdiction without limitation depending on the subject matters.

⁴² It is not to mention that the issue of jurisdiction and that of applicable law are theoretically different from each other. Nonetheless, they are, in reality, in the jurisprudence related to each other, or, it might be said that they are wrongfully connected to each other.

⁴³ Article 288, Paragraph 1 reads:

A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.

tribunals shall apply international law that is not incompatible with UNCLOS.⁴⁴ Therefore, the court and tribunals apply not only UNCLOS but also international law with respect to the use of force, principally, Article 2, Paragraph 4 of the UN Charter. As a result, if the cases before the court and tribunals involve the use of force and/or the use of arms according to the terminology of this paper, the court and tribunals consider it in accordance with the relevant international law including international law rules other than UNCLOS.

However, applicable laws should not in any sense widen the jurisdiction of the court and tribunals.⁴⁵ Therefore, even if the cases before them involve the use of force and/or the use of arms, they may not decide the arguable violations of the prohibition of the use of force as such.⁴⁶ As far as it is inseparably related to the subject of the dispute concerned, which should be a dispute on the interpretation or application of UNCLOS, they inevitably decide the issue.

When the jurisprudence is analyzed later in this paper, it is necessary to bear in mind this limit of the jurisdiction of the ITLOS and the arbitral tribunals. As far as they adhere to the limit of their jurisdiction, the judgments and awards rendered by the ITLOS and the arbitral tribunals decide the issue of the use of arms in conjunction with law enforcement measures taken at sea. This is not the case with respect to the use of force prohibited by international law. It is not expected that sufficient suggestions will be derived from them regarding the use of force prohibited by international law, since the issue is out of their jurisdiction.⁴⁷

3. The Use of Arms Accompanying Law Enforcement Measures

(1) An attempt to define the use of weapons that is not prohibited or is permitted by international law as the use of arms accompanying law enforcement measures

As confirmed above, it is difficult to find the precise meaning of “force” that is prohibited by international law. Authorities are not in accord in this regard.⁴⁸ As an outcome of this state of discussion, it is difficult to identify the category of the use of “force” or “arms” that is not prohibited or permitted by international law.

Then, as a different approach, by departing from the particular framework of arguments for the use of force prohibited by international law, mainly, by Article 2, Paragraph 4 of the UN Charter, a new line of argument may arise. Because the use of weapons that is not prohibited or permitted by international law, in many cases, accompanies law enforcement measures,⁴⁹ a

⁴⁴ Article 293, Paragraph 1 reads:

A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.

⁴⁵ As for this issue, see, for instance, P. Tzeng, “Jurisdiction and Applicable Law under UNCLOS,” *Yale Law Journal*, 126 (2016), 242–260. The issue has been addressed in the jurisprudence mainly with respect to the relationship between UNCLOS and the international law that prohibits the use of force.

⁴⁶ In comparison, as issues of interpretation or application of the relevant provisions of UNCLOS, the court and tribunals may have jurisdiction to decide the legality of the use of arms in conjunction with law enforcement measures, depending on the interpretation of the provisions concerned.

⁴⁷ This does not mean that there are no examples in which the court or arbitral tribunals overstepped the limit of their jurisdiction so as to decide, at least in some sense, the issue of the use of force, as such. This paper will not go into the issue, and here it suffices to point out that problem.

⁴⁸ **Section 1.**

⁴⁹ Strictly speaking, there may be differences between the use of arms that is not prohibited by international law, and the use of arms that is permitted by international law. With this reservation, from now on, for convenience, the expression “the use of arms that is permitted (allowed) by international law” will be adopted in order to mean both, unless confusion occurs.

reasonable way to define the use of weapons is by looking for the definition or justification of it in the relevant international laws with respect to law enforcement measures to be taken at sea.

The presupposition of this paper is that the nature of the acts or measures, in principle, decides the nature of the use of force, or the use of arms in conjunction with the acts or measures concerned. Therefore, to identify the nature of the use of arms accompanying law enforcement measures as such, it is required to determine the acts or measures in which the arms are used as those of a law enforcement nature.

Authorities have discussed the definition of “law enforcement.”⁵⁰ In line with the arguments of this paper, with its presupposition, the significance of the arguments regarding the definition of law enforcement resides precisely here. It bears the inherent weight of the presupposition set by this paper, as the definition of law enforcement defines the nature of the acts or measures, and, in principle, the nature of the use of arms in conjunction with law enforcement measures, as well.

(2) The relevant provisions regarding law enforcement

Let us look at UNCLOS and confirm the relevant provisions with respect to law enforcement.⁵¹ There sporadically exist such provisions under UNCLOS. They give the designated States the rights and also therefore the justification to take enforcement measures at sea.⁵²

There are provisions to authorize the designated States to exercise enforcement jurisdiction.⁵³ They are, for example, Article 2, which prescribes sovereignty of coastal States of territorial sea, and Articles 25, which allows them to take measures against non-innocent passage. Regarding exclusive economic zones (EEZ), Article 73 allows coastal States to take enforcement measures in order to ensure the compliance of vessels with fishery regulations.⁵⁴ Looking at the high seas, Article 94 defines the flag State jurisdiction and Article 109 confers enforcement jurisdiction regarding unauthorized broadcasting on the designated States. In a more general manner, Article 110 forms an exception for the flag State principle on the high seas and it distributes enforcement jurisdiction to the designated States with respect to the limited number of acts on the high seas. Article 111, which deals with hot pursuit, also sets forth an exception for the flag State principle on the high seas. In the field of marine environmental protection, too, Part XII of UNCLOS has Section 6, which deals with enforcement measures for that purpose.

Among these provisions, some of them have acquired the status of customary international law rules.

In the end, it can be safely said that these provisions of UNCLOS and customary international law rules provide for the rights and therefore also the justification to take law enforcement

⁵⁰ Kwast, *op. cit.*, *supra* n. 2, 53–57; Morikawa, *op. cit.*, *supra* n. 2 (Kaijo Hoshikko....), 655–659.

⁵¹ It is not to mention that many provisions under UNCLOS regarding law enforcement at sea succeeded those of the four 1958 Geneva Conventions on the Law of the Sea, and they may have the status of customary international law. Therefore, the significance of the examination of the provisions of UNCLOS does not confine itself to the examination of solely the provisions of UNCLOS. It may have further general implications.

⁵² Kwast also takes the same position as that of this paper in examining the rights and jurisdiction of States under the law of the sea. Kwast, *op. cit.*, *supra* n. 2, 53–55.

⁵³ As for a general review of UNCLOS in relation to its authorizations of law enforcement measures, see, R. McLaughlin, “Authorizations for Maritime Law Enforcement Operations,” *International Review of the Red Cross*, 98 (2) (2016), 465–490.

⁵⁴ While the coastal State of the EEZ has sovereign rights and jurisdiction on the matters other than the conservation and management of fishery resources, except for the jurisdiction under Article 73 and the jurisdiction on the marine environmental protection (the Part XII of UNCLOS), explicit provisions for enforcement jurisdiction do not exist in UNCLOS.

measures at sea on various occasions.⁵⁵ At the same time, according to the presupposition set by this paper, it should be emphasized that the rights and the justification defining the acts or measures, as their reflection, give the most important indication as to the definition or nature of the use of weapons in conjunction with the acts or measures. Such evaluation with respect to the nature of both the acts or measures, on the one hand, and the use of weapons accompanying them, on the other hand, ultimately depends on the interpretation of the provisions of UNCLOS and the relevant international law rules.⁵⁶

As presupposed above, the nature of the acts or measures as law enforcement, in principle,⁵⁷ decides the nature of the use of weapons accompanying the acts or measures as the use of arms in conjunction with law enforcement measures. Even with the confirmation of this point, still the possibility is not totally denied, under certain conditions, that the use of arms would become the use of force which is expected in the context of “military acts or measures” depending on the consideration of factors inherent to the case concerned.⁵⁸

It is totally natural to permit the designated States that are given enforcement jurisdiction to take forcible measures in order to make the enforcement measures effective. In this regard, the hot pursuit regime⁵⁹ itself finds its justification in the effective realization of the enforcement measures taken by coastal States of the territorial sea, on the one hand, and by the coastal States of the EEZs or continental shelf under certain conditions, on the other hand.

In other words, such use of weapons as that accompanying law enforcement measures taken at sea is allowed by international law. It is not because it does not fall within the purview of Article 2, Paragraph 4, but because such use of weapons is realized in conjunction with law enforcement that is defined by the relevant international law rules. It has its own nature and definition, separate from the permissible use of “force” under Article 2, Paragraph 4 of the UN Charter, or under customary international law, which reflects the prohibition of the use of force.⁶⁰

Taking this basic stance, the next question to be considered is whether solely the relevant international law that deals with law enforcement may decide the nature of the use of weapons as the use of arms accompanying law enforcement measures taken at sea, even if it sets forth the principal indication for the decision. There might be other elements or factors to be considered

⁵⁵ After careful consideration of the possible categorization of law enforcement and similar measures that are indicated by several authorities, Morikawa, bearing in mind the enforcement jurisdiction of States under the law of the sea, concluded that for the purpose of the examination of the use of weapons, a wide understanding of law enforcement is appropriate. Morikawa, *op. cit.*, *supra* n. 2 (Kaijo Hoshikko...), 655–659.

⁵⁶ This paper will not enter the issue of such interpretation. It suffices here to confirm that the legal work of the interpretation of UNCLOS and the relevant international law rules may identify law enforcement measures.

⁵⁷ As for the significance of this qualification “in principle,” see, *supra* n. 9.

⁵⁸ This paper does not take the position that the physical scale of violence critically decides the nature of a use of weapons: whether it is the use of force in military acts or measures, or the use of arms accompanying law enforcement measures. Nonetheless, the possibility is not denied that various factors need to be considered in order to ultimately decide the nature of a use of weapons. The point is, the most important and reliable indication is given by the relevant international law that deals with the rights and therefore also the justification to take law enforcement measures at sea. This paper takes this position.

⁵⁹ Article 111, Paragraph 1 and Paragraph 2 provide for the rights of hot pursuit of the coastal States of the territorial sea, and the EEZs and continental shelf.

⁶⁰ In other words, this is the way to determine, in a positive manner, the nature of the use of weapons accompanying the enforcement measures taken at sea by referring to the relevant international law. It is different from the determination, in a negative manner, of such use of weapons as that not prohibited by international law.

in finally making that distinction in each case.⁶¹ The consideration of this question will follow the next examination of the relevant jurisprudence.

(3) The jurisprudence and the relevant international law in respect to the distinction between the use of force and the use of arms

The jurisprudence is not sufficiently helpful to find the standard according to which the use of force and the use of arms are distinguished from each other.⁶² The reason is as follows.

In the *M/V Saiga* Case (No. 2), the Fisheries Jurisdiction Case, and the Guyana and Suriname Case, the courts and the tribunal really made the distinction between the use of force under Article 2, Paragraph 4 of the UN Charter, and the use of arms accompanying law enforcement measures.⁶³

However, unfortunately, they do not argue the two issues with a definite distinction between them. Namely, one is the issue of the nature and/or definition of the measures⁶⁴ that were taken against foreign vessels in the incidents before the courts and the tribunal, and the other is the issue of the nature and/or definition of the use of weapons in conjunction with the measures. The courts and the tribunal do not make clear their stance as to the relationship between the two issues.⁶⁵ Therefore, even if the jurisprudence makes a distinction between the use of force prohibited by Article 2, Paragraph 4 of the UN Charter and the use of weapons against foreign vessels in the cases concerned, it is not crystal clear whether the distinction is made as that between the military measures under the provisions of the UN Charter, and the law enforcement measures under, for instance, the provisions of UNCLOS, or as that between the use of force prohibited by the provision of the UN Charter, and the use of arms accompanying the law enforcement measures under the provisions of UNCLOS.⁶⁶ Considering this, from the jurisprudence, it is not possible to find a precise indication regarding the way the use of force and the use of arms are distinguished from each other.⁶⁷

In relation to the standpoint of this paper, rather, the following two points in the jurisprudence should be recognized. They firmly support the standpoint of this paper.

First, the fact that the jurisprudence does not clearly demonstrate a distinction between the nature of the acts or measures, and the nature of the use of weapons, means and so supports the presupposition of this paper that, in principle, the nature of the acts or measures decides the nature of the use of weapons in conjunction with the acts or measures.

Second, the jurisprudence defines the use of weapons in the incidents before the courts

⁶¹ As explained later, the weight or the significance of these international law rules would change under the current wide understanding of maritime security.

⁶² Regarding the distinction made by the ICJ in the Nicaragua Case between an armed attack and less grave use of force, and its significance in the Guyana and Suriname Case, see, Kwast, *op. cit.*, *supra* n. 2, 60–61.

⁶³ For the relevant parts of the decisions and the award, see, *supra* n. 35–40.

⁶⁴ From a wider perspective, in place of “acts or measures” they are called “military situations,” and “law enforcement situations.”

⁶⁵ In this paper, it is presupposed that the nature of the acts or measures, in principle, decides the nature of the use of force, or the use of arms, in conjunction with the acts or measures.

⁶⁶ As is pointed out next, a possible understanding of such a position taken by the jurisprudence is that it regards the two issues as the same, namely, the issue of the nature of the acts or measures, and that of the nature of the use of weapons.

⁶⁷ In other words, while the jurisprudence has made the distinction between the use of force under Article 2, Paragraph 4 of the UN Charter, and the use of arms accompanying law enforcement measures, it is not perfectly clear whether the distinction is with respect to (the nature of) the acts or measures, or with respect to (the nature of) the use of force or arms.

and tribunal as the use of arms accompanying the law enforcement measures by consulting the relevant international law⁶⁸ and the domestic laws.⁶⁹ It does not confine itself to the explanation that the use of armed force in the incidents before the courts and tribunal does not fall under the purview of Article 2, Paragraph 4 of the UN Charter. The importance of which is emphasized above,⁷⁰ departing from a sort of negative argument that the provision of the UN Charter does not prohibit certain use of weapons, setting a new positive argument is indispensable for gaining the nature and/or definition of the acts or measures, and that of the use of weapons in connection with the acts or measures.⁷¹

Then, given by the jurisprudence the distinction between the military acts and the law enforcement measures, and between the use of force in military measures and the use of arms in law enforcement measures, what are the standards that decide the legality of the use of arms in conjunction with law enforcement measures to be taken at sea?

(4) Standards that decide the legality of the use of arms accompanying law enforcement measures taken at sea

The relevant parts of the judgments and award read:

The *M/V Saiga* Case

[T]hat the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances.⁷²

The Fisheries Jurisdiction Case

...“in the manner and to the extent prescribed by the regulations, use force that is intended or is likely to disable a foreign fishing vessel,” if the officer “believes on reasonable grounds that the force is necessary for the purpose of arresting.”⁷³

The Guyana and Suriname Case

...such force is unavoidable, reasonable and necessary.⁷⁴

Among treaties, the 1995 Fish Stocks Agreement reads:

...avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties. The degree of force used shall not exceed that reasonably required in the circumstances.⁷⁵

The 2005 SUA Protocol provides for:

Any use of force pursuant to this article shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances.⁷⁶

⁶⁸ In the *M/V Saiga* Case (No. 2) the ITLOS mentioned “applicable rule of international law” and “considerations of humanity (para. 155),” *op. cit.*, *supra* n. 16. In the Guyana and Suriname Case, the tribunal referred to “(in) international law (force may be used in law enforcement activities) (para. 445),” *op. cit.*, *supra* n. 39.

⁶⁹ In the Fisheries Jurisdiction Case the ICJ referred to Canadian domestic laws (paras. 81–82), *op. cit.*, *supra* n. 37.

⁷⁰ **Section 1 (1)** and **Section 3 (1)**.

⁷¹ A similar position is demonstrated by Morikawa, *op. cit.*, *supra* n. 2 (Kaijo Hoshikko...), 661. As another way of approaching the issue of the use of arms accompanying law enforcement, under the framework of UN Security Council resolutions, Zou categorizes and examines law enforcement measures to be taken at sea and the legality of the use of arms accompanying them. Zou, *op. cit.*, *supra* n. 34.

⁷² *Op. cit.*, *supra* n. 16, para. 155.

⁷³ *Op. cit.*, *supra* n. 37, para. 81.

⁷⁴ *Op. cit.*, *supra* n. 39, para. 445.

⁷⁵ Article 22, Paragraph 1 (f).

⁷⁶ Article 8 bis, (9).

From the jurisprudence and the treaties, as the standards that decide the legality of the use of arms, the following key concepts can be confirmed. They are: reasonability, necessity, and proportionality.⁷⁷

These factors, particularly necessity and proportionality, are also the factors to be considered in order to decide the legality of the exercise of the right of self-defense. Here, it is not necessary to go into the detail of the standards according to which the use of arms or the exercise of the right of self-defense should be realized.

It is frequently pointed out that in cases of the right of self-defense, the extermination or annihilation of hostile entities is necessary and allowed. It is also assessed as being proportionate.

In comparison, in cases of the use of arms accompanying law enforcement measures, it is not usual to exterminate or annihilate the target of the law enforcement measures concerned. This is because, most importantly, the purpose of law enforcement is to ensure the observation of the law, and not to exterminate the target. This is also because the scale of violence, the legal interest to be infringed upon by the wrongful violence, and the involvement of subjects⁷⁸ are usually different between the exercise of the right of self-defense, and the use of arms in conjunction with law enforcement measures. In an extreme case, the use of arms by law enforcement entities reaching the largest scale so as to exterminate the target is not totally excluded.⁷⁹ Such an extreme use of arms has room to be permitted as being in accordance with the proportionality principle.

(5) The legal consequences of the illegal use of arms accompanying law enforcement measures

The distinction between the use of force prohibited by international law and the use of arms accompanying law enforcement measures is also reflected in the legal consequences of the illegal use of force, namely and mainly, the use of force that cannot be justified as an exercise of the right of self-defense, on the one hand, and the use of arms that is contrary to the standards that are confirmed here, on the other hand.

In cases of the use of force that is not justified as an exercise of the right of self-defense, the legal consequence is as follows. Such use of force will be reacted to by its target State with the use of force. Such reaction has the possibility to be justified as self-defense or countermeasures. In addition, the issue of State responsibility also arises, in cases of the use of force that is not justified as an exercise of the right of self-defense.

In comparison, in cases of the use of arms accompanying law enforcement measures that is contrary to standards such as reasonability, necessity, and proportionality, the issue of State responsibility is raised. There is no room for the issue of the use of force in military acts or an exercise of the right of self-defense to be involved.⁸⁰

This illegal situation is totally the same as the situation, for instance, when a State takes law enforcement measures wrongfully at sea; it needs to take State responsibility for the illegal

⁷⁷ As for other guidelines for the use of arms in conjunction with law enforcement, see, the Code of Conduct for Law Enforcement Officials, UN Doc, A/34/169, Article 3, and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 5. As for the examination of these provisions, see, Zou, *op. cit.*, *supra* n. 34, 250–251.

⁷⁸ These are among the factors to be considered in order to finally decide the nature of a use of weapons, whether it is the use of force prohibited by international law, or the use of arms accompanying law enforcement measures.

⁷⁹ In cases of law enforcement measures, targets to be annihilated should be strictly limited to the wrongdoers and wrongdoing vessels. Different from this, in cases of self-defense, according to proportionality, potential combatants could be exterminated.

⁸⁰ Ruys, *op. cit.*, *supra* n. 2, 202.

measure.⁸¹ There are cases in which a State takes law enforcement measures against a foreign vessel at sea without legal justification that is given by UNCLOS. In addition, while a coastal State of a territorial sea has the right to protective measures against non-innocent passage of a foreign vessel, if based upon wrongful judgment on non-innocence it intercepts a foreign vessel actually conducting innocent passage, the coastal State should take State responsibility toward the flag State of the foreign vessel.

In sum, the critical point is as follows. If a State uses arms in conjunction with law enforcement measures, and if it is a violation of the standards, it is not categorized by the violation as such, as the use of force that is prohibited by international law.⁸² Here, the difference between the use of force and the use of arms according to the terminology of this paper is kept by the difference between the legal consequences of the use of force prohibited by international law, on the one hand, and those of the use of arms contrary to the standards, on the other hand.

Thus far, examinations have been conducted with the presupposition that the nature of the acts or measures, in principle, decides the nature of the use of weapons in connection with the acts or measures. The remaining task is to consider whether flexible consideration of several factors is needed to finally determine the nature of the use of weapons on a case-by-case basis.

(6) A case-by-case approach to determine the nature of the use of weapons

It is argued that various factors are to be considered in order to finally decide the nature of the use of weapons.⁸³ These factors include the scale of violence⁸⁴ on both the wrongdoer side and the subjects of the use of weapons,⁸⁵ the nature of the wrongdoer involved, the political intents of the wrongdoers, and the legal interests to be infringed upon by the violence of the wrongdoers.⁸⁶

Considering the various cases in which the use of arms accompanying law enforcement measures is realized, the significance of such a flexible approach with the examination of various factors is not denied. Therefore, the presupposition set by this paper initially needs the qualification “in principle.” The nature of the acts or measures, “in principle,” determines the nature of the use of force or arms in connection with the acts or measures. By considering the factors, there might be cases in which there is a difference between the nature of the acts or measures and the nature of weapons used in those acts or measures, namely the use of force or the use of arms.

⁸¹ There are the relevant provisions under UNCLOS, such as Article 110, paragraph 3, Article 111, Paragraph 8, Article 231, and, as a general provision, there is Article 304.

⁸² The State that uses arms in conjunction with law enforcement measures needs to prove that the use of arms has that nature. As seen later, the burden of proof would be heavier with the impact caused by the current wide understanding of maritime security.

⁸³ Ruys, *op. cit.*, *supra* n. 2, 207.

⁸⁴ In the arguments regarding the meaning of “force” under Article 2, Paragraph 4 of the UN Charter, one of main factors is the scale of violence. Ruys, *op. cit.*, *supra* n. 2, 167, and 191; Corten, *op. cit.*, *supra* n. 2, 55 and 85.

⁸⁵ UNCLOS itself provides that military vessels may take law enforcement measures. These include the provisions of Article 110 and Article 111, Paragraph 5. The lack of law enforcement vessels in many countries substantiates the significance of these provisions. Kwast, *op. cit.*, *supra* n. 2, 63–64.

⁸⁶ If the subjects involved in the incident concerned are States, and if the legal interest to be infringed upon is a State’s interest, such as territorial integrity, the facts do not necessarily decide the nature of the use of weapons as the use of force. Chinese public vessels that were recently incorporated into the military sector frequently enter the Japanese territorial sea surrounding the Senkaku Islands. Japan’s sovereignty or territorial sovereignty could be violated. Nonetheless, the Japan Coast Guard has coped with such situations by taking law enforcement measures. The fact that the measures are taken by the Japan Coast Guard takes on critical importance, considering that law enforcement measures rather than military measures have been taken so as to avoid unnecessary escalation of the situations concerned.

The critical point to be emphasized is that this case-by-case evaluation is conducted under the legal frameworks that provide the nature of both military acts or measures and law enforcement measures, on the one hand, and the use of force in military acts or the use of arms in law enforcement measures, on the other hand. Therefore, the case-by-case approach is not a simple one to be conducted without any referential legal frameworks. Under the relevant legal frameworks, with the interpretation of the relevant provisions, the case-by-case approach, as a practical one, leads to a possible distinction between the use of force and the use of arms with allowance of flexible consideration of individual and concrete situations of the incident concerned. This point would be changed by the impact that is caused by the recent wide understanding of maritime security.

4. The Recent Wide Understanding of Maritime Security

(1) The recent wide understanding of maritime security

There is a firm tendency to understand maritime security in a wide way.⁸⁷ According to this, “maritime security is understood by the measures combatting military threat, terrorism, weapons proliferation, transnational crime, piracy, environmental/resource destruction, and illegal seaborne migration.”⁸⁸ Another authority explains the reason for the recent wide understanding of maritime security.⁸⁹ According to this, not only sovereign States’ exclusive interests but also the inclusive interests (common interests) of the world define a wide array of threats such that maritime security is understood widely as that combatting the variety of threats.⁹⁰ The UN Secretary-General demonstrates a similar position by counting seven threats to maritime security: piracy, terrorist acts, illicit trafficking of narcotic drugs and psychotropic substances, smuggling and trafficking of persons by sea, IUU fishing, and damage to the marine environment.⁹¹

As a State practice, Japan recently, on the 15th of May 2018, adopted the Third Basic Plan on Ocean Policy⁹² that provides for a wide range of policies and measures as those for maritime security.⁹³ It contains two categories of policies for maritime security: policies for maritime security, and policies forming the foundations for contributing to maritime security.⁹⁴ The former consists of measures such as those for maintaining the peace and order of the oceans by law enforcement, realization of the safety of marine traffic, and coping with ocean-oriented natural disasters.⁹⁵ The latter is divided into two types of measures: measures forming the basis of

⁸⁷ A typical example is Guilfoyle, *op. cit.*, *supra* n. 1.

⁸⁸ *Ibid.*, 299.

⁸⁹ Klein, *op. cit.*, *supra* n. 1, 1–10.

⁹⁰ *Ibid.*, 8.

⁹¹ UNGA, “Oceans and the Law of the Sea: Report of the Secretary-General” UN Doc A/63/63, cited by Klein, *ibid.*, 10.

⁹² As a Cabinet Decision, the Japanese government enacted the Third Basic Plan on Ocean Policy (Basic Plan) on 15 May 2018. A provisional translation is available at https://www8.cao.go.jp/ocean/english/plan/pdf/plan03_e.pdf, visited 10 April, 2019.

⁹³ This is referred to as “comprehensive maritime security.”

⁹⁴ In comparison with Klein’s position, the policies for combatting illegal acts at sea, such as IUU fishing, terrorism, environmental destruction and seaborne natural disaster, are not necessarily based upon “common” interests of international society. Sovereign States recognize these illegal acts as maritime threats to their “individual” (or according to Klein’s terminology, “exclusive”) interests.

⁹⁵ Basic Plan, 24–26.

maritime security,⁹⁶ and measures that support maritime security in a complementary manner.⁹⁷

This wide understanding of maritime security includes not only the typical issue of the use of force against military threats, but also the issue of law enforcement to combat international wrongful acts committed at sea, such as piracy, terrorism, illegal migrants, and IUU fishing, etc.⁹⁸ It strongly urges the reconsideration of two demarcations: first, the demarcation between the natures of the acts or measures in which weapons are used is required to be reconsidered. There are military acts or measures, and law enforcement measures. Second, reconsideration is also needed regarding the demarcation between the prohibited use of force and the use of arms accompanying law enforcement measures.⁹⁹

In the **Introduction**, the presupposition was set that the nature of the acts or measures, in principle, decides the nature of the use of weapons in acts or measures.¹⁰⁰ Therefore, it is appropriate to examine the impact of the wide understanding of maritime security from the viewpoint of the nature of the acts or measures, namely, military acts and law enforcement measures.

(2) The arguments on so-called “grey zones”

The concept of grey zones has not acquired a precise definition among authorities.¹⁰¹ It may designate various situations.¹⁰² However, it can be safely said that this concept has as its main purpose the clarification of the existence of a grey zone¹⁰³ in-between military acts and law enforcement measures. As this paper deals with the distinction between the use of force prohibited by international law and the use of arms accompanying law enforcement measures, it is regarded as a term to describe the grey zone between military acts and law enforcement

⁹⁶ *Ibid.*, 26–27. Among them, weight is placed on the following two policies: the establishment of the structure for maritime domain awareness (MDA) and the preservation and management of remote islands that form national borders.

⁹⁷ These are measures for economic security and protection of the marine environment. Basic Plan, 28.

⁹⁸ According to the International Maritime Organization, with the distinction between maritime safety and maritime security, the latter is related to protection against unlawful and deliberate acts, cited by Klein, *op. cit.*, *supra* n. 1, 8, n. 23.

⁹⁹ Principally, self-defense sets forth the legality of the use of force to combat the violation of international law that prohibits the use of force, such as aggression and violent invasion of foreign territories. The legality of the use of arms in conjunction with law enforcement measures is evaluated in accordance with the standards that were confirmed above.

¹⁰⁰ Regarding the room for a case-by-case approach, see, **Section 3 (6)**.

¹⁰¹ Regarding the concept of grey zones in Japanese acts, see, Morikawa, *op. cit.*, *supra* n. 2 (Gurei...).

¹⁰² In the Cabinet Decision of 1 July 2014, Japan explained “grey zones.” According to this, the grey zones are: first, a situation where an infringement from the outside that does not amount to an armed attack occurs in areas surrounding remote islands, etc., and police forces are not present nearby or police agencies cannot respond immediately (including situations in which police agencies cannot respond because of the weapons possessed by the armed groups, etc.); second, a situation where an attack occurs against the units of the United States armed forces currently engaged in activities which contribute to the defense of Japan and such a situation escalates into an armed attack depending on its circumstances. A provisional translation is available at http://japan.kantei.go.jp/96-abe/decisions/2014/_icsFiles/afiedfile/2014/07/03/anpohosei_eng.pdf, visited 10 April, 2019. As for an examination of Japan’s understanding of “grey zones,” see, Morikawa, *op. cit.*, *supra* n. 2 (Gurei...), 29–30.

¹⁰³ In discussing grey zones, in some cases, a wider concept of “situation” may be used in place of acts or measures. Concerning the term situations, see, **Introduction**.

measures, and so the use of force and the use of arms, as well.¹⁰⁴

Without entering the details of the arguments on “grey zones,” here, it suffices to point out only one thing. The presupposition set by this paper is that the nature of the acts or measures, in principle, decides the nature of the use of weapons in the acts or measures. Accordingly, the use of weapons in military measures in many cases has the nature of the use of force, irrespective of its possible legality as an exercise of the right of self-defense. The use of weapons in law enforcement measures in many cases has the nature of arms accompanying law enforcement measures.

If there is a zone that cannot be defined either as military acts or law enforcement measures, and it is a type of a grey zone, there would also be a grey zone in-between the use of force in military acts and the use of arms in law enforcement measures. Furthermore, the concept of a grey zone might make the presupposition itself even insignificant. The nature of the acts or measures would not decide the nature of the use of weapons in the acts or measures, even with the qualification of “in principle.” There would be the possibility of the use of weapons in military measures, which is different from the use of force, and the possibility of the use of weapons in law enforcement measures which is prohibited by international law.¹⁰⁵

Bearing this in mind, next, the possible impact will be considered by the wide understanding of maritime security upon the logic according to which the distinction between the use of force prohibited by international law, and the use of arms accompanying law enforcement measures.

(3) The logic to make the distinction between the use of force prohibited by international law and the use of arms accompanying law enforcement measures

The logic to make the distinction resides in applying the legal frameworks that define and deal with military acts and law enforcement, on the one hand, and the use of force or the use of arms on the other hand. In order to confirm the existence of the legal frameworks, the relevant international law rules need to be referred to. They are, for instance, Article 2, Paragraph 4 of the UN Charter, and the relevant provisions of UNCLOS.

It is true that if a flexible and case-by-case analysis has room to be applied, it is necessary to consider various factors in individual and concrete situations in order to make the final distinction between the use of force and the use of arms.¹⁰⁶ These factors include the scale of violence on both sides of wrongdoers and entities using weapons, the nature of the subjects involved in the situation, the legal interests to be infringed upon by the violence of wrongdoers, and the political intents of wrongdoers. The critical point to be precisely reaffirmed is that such a case-by-case approach is applied under or within the legal frameworks that are confirmed here. Therefore, the case-by-case approach does not mean a simple consideration of various factors without any reference to legal frameworks that definitely set certain and substantial guidelines and limits to the consideration.

In a sharp contrast to this, if the wide understanding of maritime security made the distinction between military acts and law enforcement measures meaningless, the result is as follows. It would render the legal frameworks applied for the distinction between the two acts or measures and two kinds of the use of weapons in conjunction with each act or measure less significant or even insignificant. Therefore, the distinction between the use of force prohibited by international

¹⁰⁴ As for the similar position, see, Y. Nishimura, “Kaiyo Anzenhoshō to Kokusaiho [Maritime Security and International Law],” *Mamoru Umi, Tsunagu Umi, Megumu Umi—Kaiyo Anzenhoshō no Shokadai to Nihon no Taiō* [Protecting Oceans, Connecting Oceans, and Producing Oceans—Maritime Security Agendas and Japan’s Efforts], (Nihon Kokusai Mondai Kenkyusho, 2012), 91–104.

¹⁰⁵ The same outcome may take place by adopting the case-by-case approach explained above.

¹⁰⁶ According to the terminology of this paper, the use of force means that which is prohibited by international law, and the use of arms means that which accompanies law enforcement measures.

law, and the use of arms accompanying law enforcement measures would be made by applying “a simple case-by-case approach.” Without the legal frameworks to be referred to, and without any guidelines and limits to the consideration of various factors in individual and concrete situations, based upon the consideration of various factors, the distinction between the use of force and the use of arms would be argued for and justified. It would necessarily be a very difficult task to accomplish.

5. Concluding Remarks

The use of arms in conjunction with law enforcement measures is necessary to make the measures effective. At the same time, the legal regulation of such use of arms inevitably becomes a decisive agenda for international law.

The wide understanding of maritime security includes in it law enforcement such that the distinction between the military acts and law enforcement measures will be flexible. Under such circumstances, rather than military acts, law enforcement measures at sea will be undoubtedly expected to fulfil more functions than ever in order to avoid the escalation of the situations concerned.¹⁰⁷ Thus, the critical point is not to allow such use of arms to seriously undermine the solidly established principle of the prohibition of the use of force.

For that purpose, this paper attempted to set forth the basis for the inherent argument for the legal regulation of the use of arms in conjunction with law enforcement measures. With the recognition of the two issues, namely, the issue of the nature of the acts or measures, and that of the nature of use of force or arms in the acts or measures, it carefully evaluated the development of the relevant international law and the jurisprudence. It also considered the impact by the wide understanding of maritime security upon the framework of the argument for the legal regulation of the use of arms accompanying law enforcement measures.

On the one hand, in order to justify the use of arms accompanying law enforcement measures, sovereign States must convincingly prove that they have taken law enforcement measures with the use of arms for making them effective. It will be a heavy burden on them. On the other hand, international law is still strongly required to further develop sufficient regulation on the use of arms in conjunction with law enforcement measures.¹⁰⁸

¹⁰⁷ Basic Plan, 25; Kwast, *op. cit.*, *supra* n. 2, 52.

¹⁰⁸ As one development in this direction, Morikawa attempts to identify the weight of various factors to be considered in determining the nature of the use of armed force depending on the types of incidents. Morikawa, *op. cit.*, *supra* n. 2 (Kaijo Hoshikko...), 664–672.

Relations between Japan and India in the Indo-Pacific Age

—Transcending the Quad Framework—*

Takenori Horimoto**

Abstract

Japanese people apparently share an affinity with India for several reasons, one being its history as the cradle of Buddhism. Based on this affinity, Japan-India relations grew steadily closer and stronger through the Meiji era and thereafter. This trend grew even more pronounced in the post-Cold War period. If the 1990s marked a preparatory phase, then the 2000s were a transitional phase while the 2010s have brought a huge leap forward. One of the more prominent trends through the 2010s was that bilateral relations evolved from a purely bilateral relationship and assumed importance within a broader, multilateral context. The combination of the relative decline of US power and the rapid ascension of China and India is among the factors that contributed to such transformation. The emergence of the Indo-Pacific as a cross-regional concept may be cited as yet another factor and one that interlinks with these trends.

In this paper, I present a general review of Japan-India relations in recent years together with an analysis and study of trends of countries concerned on the concept of the Indo-Pacific, India's striving for major-power status, and the quadrilateral framework between Japan, the US, India, and Australia ("the Quad"). To summarize my conclusions here, although the future direction of Japan-India ties will undoubtedly develop through their responses to China, it is also necessary to creatively build a forward-looking regional framework while keeping future developments in mind beyond the Quad.

Introduction

Japanese people apparently share an affinity with India for several reasons, one being its history as the cradle of Buddhism. In October 2017, the Kabukiza Theater in Tokyo gave a performance of the War Chronicles of Mahabharata, one of the world's three greatest epics and a tale that provides a glimpse into views on human nature and the universe that differ from those in the West. That could be why the theater tickets were sold out for consecutive days.

Based on this affinity, Japan-India relations grew steadily closer and stronger through the Meiji era and thereafter.¹ This trend grew even more pronounced in the post-Cold War period. If the 1990s marked an preparatory phase, then the 2000s were a transitional phase while the 2010s have brought a huge leap forward. One of the more prominent trends through the 2010s was that bilateral relations evolved from a purely bilateral relationship and assumed importance within a broader, multilateral context. The combination of the relative decline of US power and the rapid

* This essay was originally published on *Kokusai Mondai* [International Affairs], No.669, March 2018.

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ascension of China and India is among the factors that contributed to such transformation. The emergence of the Indo-Pacific as a cross-regional concept may be cited as yet another factor and one that interlinks with these trends.

In this paper, I present a general review of Japan-India relations in recent years² together with an analysis and study of trends of countries concerned on the concept of the Indo-Pacific, India's striving for major-power status, and the quadrilateral framework between Japan, the US, India, and Australia ("the Quad"). To summarize my conclusions here, although the future direction of Japan-India ties will undoubtedly develop through their responses to China, it is also necessary to creatively build a forward-looking regional framework while keeping future developments in mind beyond the Quad.

1. The transitional phase in Japan-India relations: Factors fueling closer ties since the 2000s

Although Japan-India relations had steadily improved following the Cold War, they suffered an abrupt setback when India conducted a series of nuclear tests in 1998.³ As a country that had centered its foreign policy on the abolition of nuclear weapons, Japan was unable to show any tolerance for these new nuclear tests. This period may be described as a preparatory phase during which the two countries sought to re-establish their bilateral relationship.

1.1 The advancement of economic ties between Japan and India

It was the 2000s and thereafter when the two countries clearly improved the bilateral relations. From a birds-eye perspective, their bilateral economic ties were the first driving force of that development. The Indian economy demonstrated steady gains backed by liberalization policies implemented since 1991, and eventually achieved average annual growth of 7.4 percent⁴ through the first decade of the 21st century. In 1993, India unveiled its Look East policy⁵ and on that basis began working to cultivate stronger economic ties with the countries of East and Southeast Asia.

By contrast, Japan in the early 2000s found itself confronted by the necessity of averting certain "China risks." More specifically, by 2004 the scale of bilateral trade between Japan and China had reached 22 trillion yen, surpassing the 20 trillion yen in trade between Japan and the United States, thus making China Japan's largest trading partner. However, around this same period, a series of large-scale anti-Japanese demonstrations and riots broke out across China. As one outcome, India began to appear ideal as a new market for Japan. In 2003, India displaced China as the largest recipient of yen loans. Official development assistance (ODA) functioned as a "connector" to strengthened Japan-India ties.⁶

1.2 Improved ties between India and the US

The second factor behind better Japan-India relations was the improvement of India-US relations. Over approximately seven decades following the Independence in 1947, India's foreign policy had been characterized by a history of trial-and-error in how to position the US in its foreign policy and how to cultivate ties with it on that basis.⁷ In fact, it would not be an overstatement to describe India's foreign policy through that period in terms of the history of its relationship with the US.

Although India-US ties began improving in the 1990s, they suffered a setback following India's nuclear tests in 1998. Then US President Bill Clinton's visit to India in March 2000, the first-ever visit by a US President since Carter's 22 years earlier, impetus for improved relations emerged and continued to grow after the George W. Bush administration came to power in 2001.

As a country that had made the Japan-US alliance the backbone of its own foreign policy, Japan viewed the advancement of India's relationship with the US as an opportunity to improve its relations with India. During the Cold War era, India pursued a foreign policy stance centered on nonalignment together with the continuation of its alliance with the Soviet Union, and thus had

little if any latitude for improved relations with the US. At that time, Delhi's limited relations with Washington exerted a negative impact on its relations with Tokyo. During a stay in New Delhi in November 2017, I was told by an Indian expert of international politics that "following the Second World War, Japanese foreign policy has been interlocked with the Japan-US alliance; during the Cold War, it was anti-communist, but since the end of the Cold War, it has been anti-China." That perspective may carry an element of truth. In any case, we cannot deny the fact that Japan-India ties have advanced in tandem with the improvement in India-US relations.

Up until the 1990s, India's foreign policy frequently reflected a pro-Soviet, and later, pro-Russian, stance, but underwent changes that eventually gave it an increasingly pro-US complexion over time. For example, Rajesh Rajagopalan professor of Jawaharlal Nehru University in international politics known for past skepticism regarding closer India-US ties, asserts that establishing stronger relations with the US is currently the only effective strategic option available to India that will help it protect its interests and ensure its security.⁸

2. China's expansion into the Indo-Pacific and Japan-India relations

2.1 China's expansion into the Indo-Pacific

China counts as a third factor that has fostered closer ties between Japan and India. To put this into better perspective, China since the 2000s has developed into a major economic and military power and pursued an assertive foreign policy. These trends have had the effect of encouraging closer Japan-India ties, which in turn have been reinforced by the Indo-Pacific as a geopolitical area.

To elaborate, the Asia-Pacific or Asia as a whole were for an a pretty long period the principal regions of interest to Japanese foreign policy.⁹ However, in the mid-2000s China began implementing an Indian Ocean sea lane strategy that others have labeled the "String of Pearls" strategy.¹⁰ Further, in 2010 it surpassed Japan to become the world's second-largest economy in terms of gross domestic product (GDP) and pursued aggressive maritime military policies in the East and South China Seas. Not only that, but beginning in 2013 it also began expanding its Belt and Road Initiative (BRI). BRI comprises a series of port and harbor infrastructure projects across the Indian Ocean rim including includes the China-Pakistan Economic Corridor (CPEC) project.

Consequently, it was not possible for India to view China's activities in the international arena as someone else's problem. Sushma Swaraj was the Minister of External Affairs for the government of Prime Minister Narendra Modi assumed office in May 2014. At a conference of heads of Indian diplomatic missions abroad that assembled in August that year, she called for the implementation of measures in line with the Act East policy that would move India from merely "looking" to "acting". After the Modi government came into power, the Indo-Pacific found increasingly frequent use within in the Indian strategic community as a policy-based regional concept; furthermore, this concept carries certain strategic implications.

2.2 A new phase in the strategic relationship between Japan and India

India demonstrated an awareness that resonates with the Indo-Pacific strategy crafted by Japan and began engaging in external actions on that basis. For that reason, it seems safe to conclude that Japan and India are capable of pursuing joint actions involving the Indo-Pacific. In fact, since the start of the 2000s, relations between the two countries have been accented by the launch of numerous regular meetings and the conclusion of various agreements. After Prime Minister Junichiro Koizumi paid a state visit to India in 2005, the two countries began holding reciprocal state visits by their prime ministers every two years. Additionally, in 2006 the Japan-India relationship was elevated to a Global and Strategic Partnership. While these steps had several

business and trade-related objectives, among them the implementation of a Comprehensive Economic Partnership Agreement (CEPA) in 2011¹¹ and the holding of the first Cabinet-level business dialogue the following year, they were primarily concerned with strategic and security-oriented issues.¹² To summarize, responding to an ascendant China was their main objective.

Sanjaya Baru, journalist, who served as media advisor to Prime Minister Manmohan Singh, has noted that during the second term of India National Congress (INC) government led by Singh (2009 to 2014), its major diplomatic achievement was the closer bilateral relations between India and Japan.¹³ Those accomplishments coincided with the birth of the second government of Shinzo Abe (from 2012), who had championed treating the Indian and Pacific Oceans as a single geopolitical unit.

3. The Indo-Pacific and India's foreign policy foundations

3.1 India, a country striving for major-power status

The rise of the Bharatiya Janata Party (BJP) under the leadership of Prime Minister Modi also factored significantly behind the increasingly close-knit ties between Japan and India. With its victory in the 2014 general election, the BJP forced the INC out and assumed the reins of government. Backed by an aggressive Hindu nationalist platform, the BJP made the “Shreshtha Bharat” initiative the centerpiece of its public commitment. In English, the Hindi “Shreshtha” roughly translates as excellence (whereas “Bharat” refers to “India”).

In effect, the BJP demonstrated that it would seek to transform India into a major power. This objective was further highlighted during a conference of Indian heads of diplomatic missions abroad in New Delhi in February 2015, about nine months after the inauguration of the new Modi government. Modi called on Indian ambassadors worldwide to help India move beyond purely upholding the balance of power and instead assume a leading role in world affairs. The drive to fulfill this role was widely accepted as a natural extension of the BJP’s “Shreshtha Bharat” election pledge.

However, subsequent remarks made on July 20, 2015 by Foreign Secretary Subrahmanyam Jaishankar had the effect of bringing India’s quest for major-power status squarely into the public spotlight. In a lecture address delivered at the International Institute for Strategic Studies (IISS) in Singapore, the foreign secretary stated in a nutshell India aspires to become a leading power rather than just a balancing power. A “leading power” can also be interpreted as meaning a “dominant state.” Here, it may be best understood simply as referring to a “major power” or “great power.” Foreign Secretary Jaishankar’s words essentially built on Modi’s remarks and shed light on their true meaning.

The declaration of intent to seek major-power status signified a crucial turning point in Indian diplomacy. Although foreign policy under the INC government also revealed India’s interest in becoming a leading power, it was distinguished by an emphasis on ensuring “strategic autonomy.” The key points in Nonalignment 2.0,¹⁴ a semi-official policy paper released in 2012 by the Centre for Policy Research, a private think tank, stood as a representative example of this stance.

3.2 The strategic framework for current Indian diplomacy

The strategic matrix shown in Table 1 images the structural compositions of Indian foreign policy aiming to achieve major-power status, in other words, its foreign policy platform since the mid-2010s. If summarized, the key point of Indian diplomacy as pursued by the Modi administration can be categorized in three levels: global, regional (Indo-Pacific), and local (South Asia).

At the global level, India cooperates with China and Russia to foster the creation of a multipolar international order as the early stages of its quest for major-power status. As a parallel endeavor, it also engages in efforts to boost its own national prosperity and military strength. At

the regional (Indo-Pacific) level, however, it endeavors to develop a larger presence and evolve into a maritime power and advance its Act East policies in the political and economic spheres through cooperation with Japan, the United States, and Australia. Politics at the local level (South Asia) will comprise a subset of regional level and try to secure its hegemonistic position. At this

Table 1. India's Strategic Foreign Policy Matrix

	Goals (○), Measures (–), Future Objectives (*)
Global level	<ul style="list-style-type: none"> ○ Multipolarization of the international system (revisionist orientation), strengthening national wealth and military power – Cooperation with China and Russia (BRICS of Brazil, Russia, India, China and South Africa summits, Shanghai Cooperation Organization [SCO], Russia-India-China [RIC] foreign ministers' meetings) – Acquisition of permanent member status on UN Security Council – Military buildup (with sustained nuclear capability) – Development of diplomatic infrastructure (such as forming strategic partnerships, etc.) * Achievement of major-power status with acquiring capacity for building the international order
Regional level (Indo-Pacific, etc.)	<p>[Asia & Western Pacific]</p> <ul style="list-style-type: none"> ○ Strengthened presence and status as maritime power – Cooperation within Quadrilateral framework (Japan, US, Australia, India) (steps to counter China) – Advancement of political and economic now Act East policies, cooperation with ASEAN economies, etc. <p>[Middle East, Indian Ocean]</p> <ul style="list-style-type: none"> ○ Establishment of superiority – Actions to counter China-Pakistan axis including BRI – Promote regional cooperation in the Indian Ocean – Cooperation with countries in Middle East and East Africa (harnessing Indian migrant resources and securing access to energy resources) * Major-power status in the Indo-Pacific <p>(Additionally, since the mid-2010s India has been moving forward with its International North-South Transport Corridor plan. The goal is to build a multi-modal cargo shipping network of sea-, rail-, and road-based corridors connecting India [Mumbai], with Iran [Chabahar Port], Azerbaijan, and Russia.)</p>
Local level (South Asia)	<ul style="list-style-type: none"> ○ Achievement of hegemonic status (with orientation toward status-quoism) – Steps to counter China-Pakistan axis – Economic integration of South Asia * Establishment of hegemony

(Source) Takenori Horimoto, "Explaining India's Foreign Policy: From Dream to Realization of Major Power," *International Relations of the Asia-Pacific*, Vol. 17, Issue 3 (September 2017) <<https://academic.oup.com/irap/article/doi/10.1093/irap/>>

level, India is currently concentrating its efforts to counter China.^{15, 16} Due to this complexity of different sets of policies at different levels, from Japan's perspective, India appears to be pursuing an inconsistent foreign policy that blends coordination with China and Russia on the one hand with cooperation with Japan and the US on the other.

4. The Quadrilateral framework (“the Quad”) in the Indo-Pacific

As long as the Indo-Pacific occupies a pivotal position in Chinese foreign policy, an atmosphere of serious apprehension will compel India to respond. That concern has been given symbolic expression by the Indian Navy. A document on naval strategy (*Ensuring Secure Seas: Indian Maritime Security Strategy*)¹⁷ released in 2015 was the first official publication to formally refer to the Indo-Pacific, and as such, presented areas of interest broader in scope than a similar document (*Freedom to Use the Seas: India's Maritime Strategy*) released in 2007. That being the case, one question is how India plans to engage with Japan, the US, and Australia. Although that question was not covered in the 2015 document, Gurpreet S. Khurana, an expert on military affairs in the Indo-Pacific has illustrated the issue in Fig. 1. In other words, to counter China in

Fig. 1. Maritime Areas of Interest to India



(Source) Gurpreet S. Khurana, “India’s Maritime Strategy: Context and Subtext,” *Maritime Affairs: Journal of The National Maritime Foundation of India*, April 19, 2017 (<http://www.tandfonline.com/doi/abs/10.1080/09733159.2017.1309747>).

the Indo-Pacific, military cooperation between Japan, the US, Australia, and India will be a must.

The Indo-Pacific is a pivotal part of China's BRI and is also the most important oceanic region to India (especially the Indian Ocean). As such, it is destined to become a theater for rivalry between these two countries.¹⁸ India has achieved rapid gains in national power in recent years. One example is its GDP, which in 2018 was ranked seventh-largest in the world, up from 12th in 2006.¹⁹ Another example is defense spending, in which India was ranked fourth worldwide in 2018, surpassing Japan's ninth-place ranking.²⁰ Nonetheless, India still trails far behind China, which is currently ranked second in terms of both GDP and defense spending. Given these statistics, India will face the necessity of joining hands with other countries. The quadrilateral framework ("the Quad") and closer ties with Japan will be the principal countermeasures to that end.

This will not be the first time India has sought multilateral cooperation. It has continued to pursue cooperation and diplomacy with other countries since gaining its independence in 1947. As a country, India is usually associated with the nonaligned movement. While that impression is not off the mark, it is only half the truth. The other half is that India has also pursued alliances and partnerships with other countries. In effect, up through the 1960s, Indian diplomacy was shaped by a policy of nonalignment and oriented toward cooperation with other nonaligned countries. Through the next two decades the 1970s and 1980s India aligned itself with the Soviet bloc.

4.1 The Quad in the mid-2000s

Moving from the preparatory phase in its foreign policy through the 1990s,²¹ India in the early 2000s once again turned to partnerships and diplomacy in response to the aggressive foreign policy of a rapidly ascendant China. As one consequence, it was compelled to participate in the Quad. From a different vantage point, at least in terms of countering Chinese policies through the 2000s and thereafter, Japan, the US, Australia, and India applied a mixture of engagement and hedging policies, albeit marked by varying degrees of intensity. The Quad framework itself was a classic hedging policy.

In the mid-2000s, Japan, the US, and Australia began intensifying their efforts in engagement with one another for the Quad framework with participation by India. During the Asia-Pacific Economic Cooperation (APEC) leaders' summit that convened in Sydney in September 2007, Japan, the US, and Australia held their first top-level trilateral meeting. Quoting a Japanese Foreign Ministry press officer in its September 7 edition, one Indian newspaper²² reported that India had been asked to participate in the meeting as a country with a shared interest in the ideals of liberalism and democracy. Japan's 2007 White Paper on Defense (July 2007) also cited strengthened cooperation with Australia and India and called for policies that would help curb the growing prominence of China and North Korea in the military dimension and ensure a more stable balance of security at the regional level through strengthened collaboration by Australia and India on matters of security.

Additionally, in August 2007 the US Center for Strategic and International Studies (CSIS) published *The US-Japan-India Report* in collaboration with the Japan Institute of International Affairs and the Confederation of Indian Industry. Underlining the importance to the US, Japan, and India of protecting their shared values and sustaining an open and stable international system, this report recommended strengthened trilateral cooperation (along with Australia) in the security, energy, environmental, and economic fields.²³ Although described as something that should not be construed as "targeting China" per se, the plan nevertheless resembled aspects of the Quad, which comprised hedging policies aimed at China.

As an outcome of this report, India decided to participate in the Quad. In September 2007, five countries of the US, Japan, India, Australia, and Singapore conducted Malabar 07-2, a joint naval exercise in Bay of Bengal. The scope of this exercise extended from the central region of the Bay of Bengal to the vicinity of the Coco Islands in Myanmar territorial waters (where China

was noted in India to have stationed meteorological monitoring facilities). Malabar 07-2 was a large-scale undertaking that mobilized approx. 20,000 naval personnel, 28 ships, and 150 aircraft; its implementation as a multilateral exercise was the key feature that distinguished it from past Malabar exercises by India and the US.

The countries that participated in Malabar 07-2 insisted that the exercise was primarily aimed at boosting the interoperability of their naval forces and stressed that it was not intended to establish an “axis of democracy” in the Asia-Pacific to contain China.²⁴ However, the Kyodo News agency was arguably closer to the mark with its assessment that it was aimed at strengthening cooperation by participating countries in protecting the sea lanes for oil tankers and other cargo traffic from the Indian Ocean into the Pacific. Kyodo reported that “such objectives also reflect a conscious interest in curbing efforts by China to provide aid to Indian Ocean basin countries and expand its network for military cooperation and that Japan considers the exercises to be an integral element of the Quadrilateral Security Dialogue between Japan, the US, India, and Australia, as proposed by Prime Minister Shinzo Abe.”²⁵

The Quad drew harsh criticism from China. Furthermore, following the political exit of its main proponents, namely, US President George W. Bush, Japanese Prime Minister Shinzo Abe, and Australian Prime Minister John Howard, Howard’s successor, Prime Minister Kevin Rudd (December 2007 to June 2010), implemented policies that put stronger emphasis on ties with China. Rudd also was not supportive of the Quad and thus terminated Australia’s involvement, leaving the Quad to die out spontaneously. However, the Quad lived on as a series of bilateral policy hedges against China: Specifically, these were the New Framework for the US-India Defense Relationship (2005), the India-Australia Memorandum of Understanding on Defense (2006) and Joint Declaration on Security Cooperation (2009), and the Joint Declaration on Security Cooperation between Japan and India (2008), for Japan, the first such arrangement with a country other than the US or Australia.

Although the Quad was shelved, Japan’s gradually strengthening security ties with Australia and India along with the Japan-US alliance nevertheless sent a signal that a new security order was taking shape in Asia.²⁶ In short, the Quad may be better understood in terms of its association with the Indo-Pacific, a new regional designation that emerged in the 2000s.

4.2 Efforts to promote the Quad by Japan, the US, and Australia in the 2010s

With that historical backdrop, on November 12, 2017 senior officials for diplomatic authorities in Japan, the US, Australia, and India met on the occasion of the ASEAN summit in Manila. They “discussed measures to ensure a free and open international order based on the rule of law in the Indo-Pacific” and “affirmed their commitment to continuing discussions and deepening cooperation based on shared values and principles” (“Australia-Japan-India-US Consultations on the Indo-Pacific,” a November 12, 2017 press release on the Japanese Ministry of Foreign Affairs website).²⁷

These four-way consultations by diplomatic authorities represented a substantive first step toward implementation of the Free and Open Indo-Pacific Strategy championed by Prime Minister Shinzo Abe at the Sixth Tokyo International Conference on African Development (TICAD VI) that assembled in Kenya in August 2016.²⁸ Japanese Minister for Foreign Affairs Taro Kono proposed the creation of a new quadrilateral framework at the August 2017 gathering of foreign ministers for the seventh Japan-US-Australia Trilateral Strategic Dialogue in Manila, and again on the occasion of the Japan-US-India Trilateral Foreign Ministers’ Meeting in New York.²⁹ Kono articulated his views on creating a summit-level quadrilateral strategic dialogue again on October 25, 2017.³⁰ During their November 2017 summit meeting in Japan, US President Donald Trump and Prime Minister Abe were in agreement on the Indo-Pacific strategy.

This latest Quad proposal presents Japan in a cheerleading role and appears to have won

support from the US for a transition from diplomacy centered around the US and China to a new framework that allows them to use relationship with India as a diplomatic card. During the Obama administration, the US advanced an Asia policy that paired the Trans-Pacific Partnership (TPP) in the economic and trade spheres with a policy of strategic rebalancing to the Indo-Pacific or Asia. However, under the “America First” policies of President Trump, the US withdrew from the TPP. As a consequence, during his November 2017 tour of Asia, President Trump arguably had little choice other than to join the Indo-Pacific strategy championed by Japan. In Washington on October 18, 2017, prior to the state visit to Asia, US Secretary of State Rex Tillerson clarified his views regarding security cooperation by Japan, the US, India, and Australia.³¹

T. J. Pempel (University of California) has summarized the first year of Trump’s administration as an exercise in “democratic destruction and Asian absenteeism.”³² Also, immediately prior to his tour of Asia, Trump and his national security advisor, H.R. McMaster, reportedly began using the term “Indo-Pacific” with increased frequency.³³

In the National Security Strategy that it released in December 2017, the US government revealed a sense of alarm toward China and Russia, and criticized China as a country that “seeks to displace the United States in the Indo-Pacific region” and “expand the reaches of its state-driven economic model.”³⁴ It noted that the United States “welcomes India’s emergence as a leading global power and stronger strategic and defense partner,” and added that it “will seek to increase quadrilateral cooperation with Japan, Australia, and India.”³⁵

However, not all changes to US policy on Asia are attributable to the arrival of President Trump. On the importance of Japan and China to the US, Sheila Smith, a leading scholar in the field of Japan studies, points out that building cooperative ties with China while avoiding harm to the close relationship between Japan and the US is the biggest challenge that US policymakers face.³⁶ Given the implications of that perspective, the Quad is at present probably an appropriate framework for consultations at the diplomatic level. The American political scientist John Mearsheimer notes that a behind-the-scenes approach that places most of the burden of containing China on neighboring countries is the best strategy for the US as a country with a rich history as an “offshore balancer.”³⁷

New perspectives have also been tendered on the role of US Forces in Japan. For example, Mikio Haruna, a journalist who has examined released US diplomatic documents with confidential content, states that the reality of the Japan-US alliance, that is, the US forces stationed in Japan, are not there to defend Japan but rather to provide for the strategic defense of South Korea, Taiwan, and Southeast Asia, and concludes that military logistics are their main mission.³⁸

Published in November 2017, Australia’s *2017 Foreign Policy White Paper*³⁹ repeatedly discusses the Indo-Pacific. In Chapter 3 (A stable and prosperous Indo-Pacific),⁴⁰ the white paper notes, “Our alliance with the United States is central to Australia’s security and sits at the core of our strategic and defense planning.” On that understanding, it follows up by stressing the central roles of the US and China in the Indo-Pacific and cites Japan, Indonesia, India, and South Korea as partners in the Indo-Pacific region. Another white paper (*Australia in the Asian Century*)⁴¹ released by the Australian government in 2012 only mentions the Indo-Pacific in three places.

Within the sphere of foreign trade, Australia is heavily dependent on China. In 2016, exports to China were valued at US\$94.0 billion, making China the top destination market for Australian goods. (Japan was the second-largest market, valued at US\$39.0 billion, while the US came in third place, at US\$21.0 billion.) China was also the largest source of Australian imports, at US\$62.0 billion in value (followed by the US at US\$44.0 billion and Japan in third place at US\$23.0 billion).⁴² Moreover, China’s powers of influence over Australia’s internal affairs have grown more serious in recent years.⁴³ In effect, Australia has established economic ties with China that compare with its ties to ASEAN, a situation that in strategic terms has compromised its ability to cope even as a member of the Quad.

4.3 Mixed views toward the Quad

Scholars in the US have expressed doubts about the reincarnation of the Quad as version 2.0.⁴⁴ It is true that on his visit to India in September 2017, Prime Minister Abe coordinated views with Prime Minister Modi on maritime security and agreed on the subject of curbing China's advances into the region. Despite reaching an agreement to "continue the discussions," the November 2017 conference of diplomatic authorities for the four Quad countries did not set a clear timetable for the next round. Further, participation in the discussions has been limited to officers at the bureau-head level. Presumably, India will hold the key that determines whether the meetings are upgraded to the foreign-minister level. In effect, it is as if Japan, the US, Australia, and India do not share equal levels of commitment to the Quad.

Comparable precedents exist. Prior to the start of these quadrilateral discussions, two trilateral conferences had been held: one involving Japan, the US, and India, and the other involving Japan, India, and Australia. The Conference involving Japan, the US, and India was launched in December 2011 after participation had been downgraded to the bureau-head level from its initially planned foreign-minister level. This (bureau-head level) trilateral conference convened eight times until its conclusion in 2016. The first foreign-minister level meeting was held in 2015. In effect, India was integrated into the existing Japan-US framework.⁴⁵ The first meeting of the other trilateral conference with the participation of foreign secretaries from Japan, Australia, and India was held in 2015 and concluded with its third meeting in 2017.

India's China-oriented foreign policy was one reason that factored strongly behind its lack of enthusiasm for the Quad. When the Modi government came into power, Sandy Gordon, an expert on South Asia (Australian National University), predicted: "That realisation may not stop the Modi government attempting to 'play both ends against the middle,' especially since this approach has been a classic feature of Indian foreign policy for many decades. Under this scenario, India would seek the best deal it can from China, both economically and in terms of a possible border settlement, while attempting to maintain its hedge against a possible difficult rise of China with powers such as the US and Japan."⁴⁶

Former Indian Foreign Secretary Kanwal Sibal has suggested India need not choose between either Japan or China as a partner; it can cooperate with Japan on China policy and in other areas where they have a shared interest, and with China in areas that deliver mutual benefits.⁴⁷ Furthermore, even if India saw value in working together with Japan and the US, it may have lacked motivation to team up with Australia.⁴⁸

In its September 26, 2017 issue, the Japanese edition of *Newsweek* magazine ran a special feature titled "Indo no kyo-zou" ("an Indian giant elephant"), which noted in effect, "while Japan looks to India as a partner to help contain China," India does not yet actually have enough power to compete with China nor is it necessarily pro-West or anti-China. While India would prefer to follow an independent approach to China, collaborating only with Japan will still not be sufficient. That is presumably why it will be compelled to rely on the Quad framework as well.

As indicated earlier in Fig. 1, at the regional level, the Indian Ocean counts as the primary battleground for Indian diplomacy at this time. China, moreover, will be India's main counterpart in that engagement. Given that India is pursuing a two-pronged policy⁴⁹ of both engagement and hedging with respect to China, Quad discussions involving the diplomatic authorities are a viable and realistic option for diplomacy at this stage.

On closer examination, India could utilize the Quad as a mechanism to curb China's ambitions and respond to its criticism of the Quad through exchanges at the working level, not at the head-of-state or foreign-minister levels. Of course, as a formal participant in the summit-level conferences of SCO and the BRICS (five emerging national economies) summits, India is also prepared to seek elevated Quad status at any time. Moreover, the foreign ministers of Russia, India, and China (RIC) have met regularly since 2002, and convened their 15th meeting in India

in December 2017.

Moreover, India and China has established the meeting of the Special Representatives of the two countries in 2003 and its 22nd meeting between National Security Advisor Ajit Doval and State Councilor and Foreign Minister Wang Yi has held in December 2019. Also, Prime Minister Modi emphasized “inclusive” nature of the Indo-Pacific at his keynote address at Shangri La Dialogue in June 2018. He might have intended to tell China “Free and Open Indo-Pacific (FOIP)” to signify its inclusive nature and not excluding China. Basically, India would like to keep stable relations with China.

India has pursued a balancing act with China and Russia on the one hand and Japan and the US on the other. From another angle, India may be viewed as a country that has engaged in cooperation with Japan and the US in the Indian Ocean and with China and Russia on the Eurasian continent. As one element of its continental strategy, India has been working to put into motion its International North-South Transport Corridor plan, an undertaking that will establish improved sea, rail, and road connections for cargo flows between India (Mumbai), Iran, Azerbaijan, and Russia (Table 1).

4.4 China's apprehensions about the Quad

China categorically rejected the Quad when it first materialized in 2007 and deemed the multilateral Japan-US-India, US-Australia-India, and Japan-US-Australia-India frameworks as policies aimed at encircling China.⁵⁰ It has reacted to the latest incarnation of the Quad in much the same way. For example, Chinese experts have warned that the four-way dialogue signifies an effort to contain China and that it will stymie regional development.⁵¹ Additionally, as an alternative to rebalancing policies in the Asia-Pacific, the Indo-Pacific strategy has been viewed as an undertaking with the objective of disrupting the BRI but that is destined to fail.⁵²

The Quad, moreover, has been described as an Asian version of the North Atlantic Treaty Organization (NATO).⁵³ During a press conference on November 13, 2017, Geng Shuang, Deputy Director of the Chinese Foreign Ministry's Information Department, hinted at China's misgivings about the Quad with his emphasis that it should be a framework that encourages cooperation by all relevant countries, not a mechanism for exclusion.⁵⁴ In fact, representatives of the Quad have been upgraded from the bureau-head level to foreign minister level for the first time in September 2019 at the New York meeting during the United Nations General Assembly.

5. Future prospects

Geopolitical developments in the Indo-Pacific have shifted the focus to the question of how to deal with China. China has rallied from a history of humiliation that stretches back to the Opium Wars and now aspires to achieve the “Chinese dream” through a grand resurgence of the Chinese people.⁵⁵ In other words, one could argue that China is striving to wrest hegemonic dominance in this region from the US and establish a China-centric international order. In a sense, it appears to be in the process of acquiring the capacity to build a new international order and establish itself as the rule-maker.

Since the start of the twenty-first century, the situation in the Indo-Pacific has been marked by the growing national power of China and the relative decline of the US, which has been losing its capacity to keep China in check.⁵⁶

Under such development, as a strategic framework in the Indo-Pacific for Japan, the US, Australia, and India, the Quad has been brought into existence to counter these trends. Neither Japan nor India are capable of halting China's growing influence on their own, nor can they rely on the US. They have no choice but to turn to “minilateral” cooperative mechanisms that occupy an intermediate position somewhere between the bilateral and multilateral approaches. Unlike Europe, Asia does not yet have any well-established economic or security frameworks. The

implication is that the Quad will serve as an inescapable regional mechanism for the Regional Comprehensive Economic Partnership (RCEP) for East Asia or the East Asian Community. Since the RCEP is one of the main components of Japan's, Indo-Pacific policy along with the Quad, India's withdrawal from it said in November 2019 would be the big miscalculation for Japan.

India has aspirations of major-power status. For now, however, strategies based on partnering mechanisms are its only option. The Japan-US alliance was the single largest infrastructural cornerstone of Japan's foreign policy. However, Japan's dependence on the US appears to be softening. Given these conditions, ties between Japan and the India will continue to grow closer and develop even further.⁵⁷ The US cannot be described as an ally that Japan can always rely on 100 percent; India, however, is in a position to complement that relationship. India actually faces a similar situation, itself. After the Cold War, Russia harnessed its semi-alliance functions to provide backing for Indian efforts in diplomacy.

However, since the mid-2010s, Russia's leanings toward China have grown more pronounced. Moreover, ties between China and Pakistan have rapidly grown much closer as an outcome of the CPEC project and also in reaction to the cooling trend in US-Pakistan ties. Given these developments, Japan is a welcome presence in India's eyes.⁵⁸

That said, as is commonly the case with close bilateral ties, the relationship between Japan and India may be described as a marriage of convenience because Japan is pursuing policies to sustain the status quo while India has future aspirations of becoming a major power. Consequently, one cannot discount the possibility of disparities arising between Japan and India in terms of awareness or within the context of policy implementation. Although such disparities have not seriously harmed their bilateral relations up to now, major problems could emerge in the future.

The US, Japan, China, Australia, and Indonesia to say the least of India are all countries with significant powers of influence in the Indo-Pacific. Although their current administrations are already positioned or seen likely to retain the reins of government. Modi government continues in its second term by its ruling party, Bharatiya Janata Party has won the landslide victory in April–May 2019 general election. Therefore, India's Indo-Pacific policy is able to understand in terms of its continuity.

Although not discussed in this paper, the North Korea issue will be a major factor for uncertainty in the Indo-Pacific. Relations between Japan and India in the Indo-Pacific will continue to face these uncertainties as well as a set of unpredictable conditions in the years ahead.

A sense of mutual affinity is at the root of the relationship between Japan and India, and that foundation is not going to be shaken. That said, Japan-India ties have transitioned from a limited bilateral relationship to a bilateral relationship with a cross-regional emphasis, and that relationship can be expected to develop a more-realistic political and economic dimension. Japan needs to move beyond the RCEP and TPP frameworks in the economic arena and the Quad in the strategic arena and act as quickly as possible to build an inclusive multilateral framework by expanding and strengthening the East Asian Community and welcomes the participation of China. Japan and India are both entering an era that will call on them to fulfill their commitments to broader Asia and the global community.⁵⁹ In the process, they will face the necessity of looking beyond their mutually complementary bilateral relationship and recognizing it as a new international asset to the Indo-Pacific at large.⁶⁰

(January 13, 2018. Updated on February 27, 2020)

Notes

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Evolving Security Alignments of the Indo-Pacific: The US Alliances, the Shanghai Cooperation Organisation, and ASEAN

Thomas S. Wilkins*

Abstract

Strategic analysts and scholars have consistently searched for the best macro-level intellectual frameworks to capture the security dynamics of the complex Asia/Indo-Pacific region. Instead of following the common practice of cataloguing and appraising the wide variety of institutions that comprise the region's so-called "security architecture" (a problematic construct; as will be revealed), this article proposes that the structural dynamics of the region's security can be better apprehended through the specific concept of "alignment." From this perspective it is argued that three relatively well-defined alignment "blocs": the US alliance network, the Shanghai Cooperation Organization strategic partnership network and the ASEAN security community serve to influence and structure strategic interactions across the region. By examining the internal composition, purpose, and behaviors of these alignment groupings—and the challenges they each face—we can gain new insights into how the consequent regional security order is produced.

"Alignment" as an ordering principle for understanding the Indo-Pacific security landscape

How to gain analytical purchase on the "big picture" of the extraordinarily complex security dynamics Indo-Pacific region is one of the greatest challenges faced by strategic analysts. And while policy-maker's attention is understandably captured by immediate events and pressing issues, this can sometimes come at the expense of deeper reflection upon the underlying structural drivers of Indo-Pacific security dynamics. Nevertheless, it is crucially important for long-term strategic planning purposes to delve into the deeper security "structures" that animate state cooperation and conflict, and which consequently define and shape the region's security order. Studies with this aim in view usually tend to focus upon the tangible institutions that constitute the region's so-called "security architecture"; by which we mean the institutional security mechanisms that contribute toward security governance, or otherwise superintend individual or collective security to states.

The so-called "noodle bowl" of regional agreements, regimes, and institutions in the Indo-Pacific encompasses everything from economic forums such as Asia-Pacific Economic Cooperation (APEC), inter-regional meetings, such as the Asia-Europe Meeting (ASEM), and Track II dialogues such as Council for Security Cooperation in the Asia Pacific (CSACP), and everything in-between, making any attempt to impose some kind of schematic for properly comprehending this security architecture a daunting task. But in addition to the insurmountable complexity of the problem, the "security architecture" notion fails to recognise the inherent *qualitative* differentiation between its various constituents, usually lumping together multilateral

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security dialogue mechanisms, such as the ASEAN Regional Forum (ARF) or East Asia Summit (EAS), (often referred to as “talk shops”), with formal military alliance pacts that include joint defence planning, such as the Japan-US Alliance, or ANZUS (Australia-New Zealand-US). These examples should on no account be conflated, as the former contain an *inclusive* range of states, often working at cross-purposes, whilst striving toward confidence building measures, whereas the latter represent an *exclusive* alignment of states working toward mutually shared security and defence objectives, including joint military planning.

In a bid to disaggregate these two “unlike” forms of security architecture, and based on an extensive pan-regional study undertaken for the monograph *Security in Asia Pacific: The Dynamics of Alignment*, this article introduces the notion of “security alignment” as an alternative approach toward capturing the structural characteristics of the current Indo-Pacific security environment.¹ “Security alignment” refers to a genuine and committed effort by states to coordinate their security strategies. It will invariably manifest itself in some identifiable institutional form—whether this be a formal military alliance, or another form of exclusive organization, (including *some* plurilateral security institutions with exclusive, rather than inclusive membership). Indeed, while the alliance paradigm of alignment has traditionally been a dominant form, the phenomenon is not confined to these alone, and includes coalitions, ententes, strategic partnerships and security communities, among others. Naturally, some forms of alignment will be tighter and more developed than other looser arrangements: not all alignments take the form of “alliances” (but *all alliances are alignments*).

The key point is that alignment partners basically subscribe to a common set of security objectives, coordinate their resources closely toward these, and do not admit “outsiders” to their exclusive “club,” thus differentiating them from region’s multitude inclusive security dialogue forums (though all alignments, including alliances, are *institutionalised*). Moreover, when aligned states act together as holistic “units,” they are frequently in *competitive* tension with one another in terms of their respective security goals (though this does not preclude elements of cooperation, including by individual member states). Using alignment as a reductionist perspective to allow us to get behind the vast proliferation of regional institutions and diverse state actors promises to simplify (reify) our understanding of the larger question of security structures in the Indo-Pacific. Indeed, the phenomenon itself has traditionally been held as fundamental to the understanding international politics by an array of seminal scholars in the International Relations discipline. As prolific alliance scholar George Liska attests: “Alignments are always instrumental in structuring the state system, sometimes transforming it.”²

The Indo-Pacific security structure: three power centers of alignment

On the basis of these criteria, the US hub-and-spoke (H&S) alliance system, the Shanghai Cooperation Organisation (SCO) strategic partnership, and the ASEAN security community—but *not* its extended organs, such as the ARF/EAS—generally fulfil these criteria of *alignment* (though some caveats appear). At their core, they are all largely exclusive organizations, and each acts as a vehicle to provide security for its membership through coordinated policy objectives aimed at both internal and external security challenges, even if the institutional form of security cooperation—alliance, strategic partnership, and security community, differs in each case. These alignment groupings are different in their nature, purpose, design, internal dynamics, and external orientations, as will be demonstrated below. Moreover, it is these three alignment groupings that characterise the structural security landscape of the Indo-Pacific

¹ Thomas S. Wilkins, *Security in Asia Pacific: The Dynamics of Alignment* (Boulder: Lynne Rienner, 2019).

² George Liska, *Nations in Alliance: The Limits of Interdependence* (Baltimore: Johns Hopkins University Press, 1962), p. 12.

region, with each holds a competing “vision” for the future of regional order. Thus, as exclusive alignments, each of the three stands out as a “pole” of power and attraction, putting forward their own distinct visions of regional order and seeking adhesion to this among other external states. On the one hand, we have the Washington-led H&S alignment of maritime liberal democracies in the Pacific, backed by American military predominance. Standing in contrast to this is the Sino-Russian authoritarian compact at the heart of the SCO, backed by Beijing’s cascade of Eurasian economic initiatives and institution building, alongside Moscow’s superpower nuclear arsenal. Juxtaposed with these two rivalrous blocs are the ASEAN countries seeking to retain their “centrality” in regional security discourses and governance through their expansive institutional and normative framework (The “ASEAN way”). Together, these three alignments largely define the security structure of the Indo-Pacific region.

Notably, as each alignment grouping seeks to expand its power and influence over the regional order it has developed “networks” with external parties, extraneous to their core membership, and even *across* other alignments, to further its aims. These networking attempts could be conceived of as an “H&S plus,” “SCO-plus,” and “ASEAN-plus” configurations. With these parameters in mind, let us now unpack each of the three alignment groupings that define the overall structure of the Indo-Pacific security landscape: the US-alliance network, SCO strategic partnership network, and ASEAN security community network in turn, to probe into their background, nature, activities, and the challenges they each face going forward. (Note that the analyses below are merely “snapshots” of these alignments, and the book *Security in Asia Pacific* above, may be consulted for fully detailed accounts.) And while it should be noted that “alliances” such as the US H&S system have typically taken center stage in both academic and policy analyses, this article seeks to draw attention to the SCO and ASEAN as alternative, specifically-“non-alliance,” pathways toward security alignment.

The US alliance network

The US hub-and-spokes system of alliances was developed at the time of the San Francisco Peace Treaty in 1951, with the foundation of the Japan-US alliance and the ANZUS alliance, and US-Philippines Mutual Defence Treaty. This was later extended to alliance pacts with South Korea (1953), Thailand (1954), and Taiwan (1954: now defunct and replaced with Taiwan Relations Act (TRA)). It represents the strongest form of security alignment in the region, founded as it is upon a range of formal military security guarantees, including a commitment to joint defence. As such, these security alignments closely conform to Robert Osgood’s definition of an alliance as “a formal agreement that pledges states to co-operate in using their military resources against a specific state or states and usually obligates one or more of the signatories to use force, or to consider (unilaterally or in consultation with allies) the use of force in specified circumstances.”³

As Victor Cha has written, at the inception of the H&S Washington preferred a series of bilateral alliance pacts to a multilateral structure such as NATO, though this preference has now been eroded as policy-makers have sought to reform the H&S system to meet new challenges in the 21st Century.⁴ Today, the H&S alliances are being transformed in line with internal and external pressures. Nevertheless, cooperation between “core allies”—Japan and Australia—and the US has been greatly augmented. Not only have Tokyo and Canberra individually deepened their alliance relations with the US through deeper military integration and security cooperation under the “Free and Open Indo-Pacific” (FOIP) vision, but they have also initiated direct bilateral

³ Robert Endicott Osgood, *Alliances and American Foreign Policy* (Baltimore: Johns Hopkins Press, 1968), p. 17.

⁴ Victor Cha, *Powerplay: The Origins of the American Alliance System in Asia* (Princeton: Princeton University Press, 2016).

security cooperation by means of their own security alignment, (dubbed a “Special Strategic Partnership”).⁵ This process is further triangulated through the Trilateral Strategic Dialogue (TSD) process between the three allies, arguably adding up to a “virtual trilateral alliance.” In addition to the strengthening and consolidation of the alliance “core,” the hub-and-spokes has taken on a “networking” aspect. Washington has not only encouraged contacts between the “spokes”—such as Japan and Australia, and with elusive success; Korea and Japan—but new “strategic partners” have been sought as affiliates to the existing H&S network. Among these potential adherents to the US-alliance network is India, which has been brought into the “Quad” process (and FOIP), but also key South East Asian (SEA) states such as Vietnam and Singapore.

With its origins as a set of formal military alliances, the US-alliance network, was originally designed to counter the Cold War threat emanating from the Communist bloc. With the collapse of the USSR in 1991 and the subsequent integration of the PRC into the capitalist world economy since then, these alliances were adrift and “threatless” for most of the Post–Cold War period. New life was breathed into the US-alliance network after the 2001 terrorist attacks as Asian allies were co-opted by Washington to provide military support for the “war on terror.” By 2011, Washington had begun to view its military interventions in the Middle East as costly diversion away from the evident locus of geopolitical power centering on the Indo-Pacific. The “pivot” (or “rebalance”) policy of the Obama Administration sought to refocus attention back to this crucial region.⁶ This policy shift was in response to increase Chinese assertiveness in the region, exemplified by its rapid military modernisation and its assertiveness in the South China Sea (SCS). Now, the Trump-era *National Security Strategy* (2017) makes explicit the return of “great power rivalry” with a risen China and a resurgent Russia, with an ever provocative nuclear-armed North Korea in the background. The US has thus begun to push back more forcefully against these actors, which have both shown a disregard for internal norms and law and seek to pressure the US and its allies through an array of “disruptive” policies and “hybrid warfare” techniques.⁷ The original *raison d'être* of the alliance system of balancing potential great power threats has apparently resurfaced accompanied by talk of a “new Cold War.”

But the alliance has also concentrated upon renewing the normative legacy of the so-called “San Francisco system” that has always accompanied the actual military alliance dyads themselves.⁸ During the Cold War American military predominance, extended through its alliance network, imposed peace and stability upon the region, allowing for East Asian states to focus upon rapid economic advancement, as well as supplying a variety of “public goods” such as freedom of the seas. This US-imposed regional order served the security interests of allies, (and some non-allies), well until the beginning of the 21st Century. Yet, as this San Francisco system has been eroded both by a relative decline in American power, it has been concomitantly challenged by ever more disruptive activities by new regional challengers such as North Korea, China, and Russia. As such, renewed efforts are underway by the US and its allies to uphold the liberal principles of the de facto “Rules-based order” centered around the principles of free trade, open markets, human rights (and support for democratisation). Such efforts have coalesced into the Free and Open Indo-Pacific vision that unites the core US allies, with India, and which welcomes any state that subscribes to its principles. The shared commitment to maintaining a rules-

⁵ Thomas Wilkins, “From Strategic Partnership to Strategic Alliance?: Australia-Japan Security Ties and the Asia-Pacific”, *Asia Policy* 20 (2015), pp. 81–112.

⁶ Kurt M. Campbell, *The Pivot: The Future of American Statecraft in Asia* (New York: Twelve, 2016).

⁷ Thomas Wilkins, “Australia and Japan Facing ‘Disruptive’ Challenges to the Rules Based Order in the Indo-Pacific,” *Policy Brief*, September 26, 2018.

⁸ Kimie Hara, *The San Francisco System and Its Legacies: Continuation, Transformation and Historical Reconciliation in the Asia-Pacific* (New York: Routledge, 2015).

based order based upon US regional primacy unites the US-alliance network in response to its challengers that seek to act as “spoilers” of regional order, and revise the status quo through coercive and unilateral actions.

However, the US-alliance network faces challenges going forward in upholding both its primacy and its vision of regional order. Firstly, the US no longer enjoys undisputed economic or military supremacy, especially in the Indo-Pacific. Moreover, the abrogation of the Trans-Pacific Partnership (TPP) in 2017 and the failure to adequately replace the carefully crafted Pivot/Rebalance strategy of the previous Administration with a tangible and cohesive regional strategy has weakened the props of the US-led alignment. Instead we have an as yet ill-defined policy of “strategic competition.” Secondly, the Presidency of Donald Trump has rhetorically undercut US commitment to its allies by questioning security guarantees and spreading accusations of free-riding among allies. This has greatly undermined US credibility among allies and foes alike. Paradoxically, however, his demands for increased alliance contributions (in light of limited American resources) may actually strengthen the aggregate capabilities at the heart of the US-alliance network as allies increase their defence budgets and military acquisitions. Lastly, there are signs of distancing at the periphery of the original H&S network. It is arguable that both Thailand and the Philippines are drifting away from Washington and seeking a closer relationship with the PRC, while New Zealand has been officially expelled from ANZUS, and South Korea to some extent remains a moribund ally, trapped by its unavoidable focus upon the North Korean threat. These relationships will require political investment and resources to renew to avoid the further slippage of these peripheral allies into China’s orbit.

The SCO strategic partnership network

The Shanghai Cooperation Organisation, spearheaded by Beijing, represents a newly emergent security alignment in eastern Eurasia in implicit, if not direct, contention with the H&S network. In partnership with Moscow, by means of the Sino-Russian Strategic Partnership, and with India as the latest major power to accede to the organization (2017), the SCO now clearly represents an alternate pole of power in the Indo-Pacific and potential challenger to the vision of regional order championed by Washington and its allies. The SCO has its origins in the post-Cold War rapprochement between erstwhile Communist allies, Russia and China, which was formalised in its 1996 Strategic Partnership, and 2001 Treaty of Good neighbourliness and Cooperation.⁹ These two events occurred near-simultaneously with the foundation of the “Shanghai Five,” later to become the SCO, to include the Central Asian states of Kazakhstan, Uzbekistan, Kyrgyzstan, and Tajikistan, in an axis of authoritarian Eurasian states. It was initially created to resolve border disputes and mitigate strategic competition between Beijing and Moscow in the Central Asian region itself, but soon developed into a formal organization to address a range of joint non-traditional security challenges, dubbed the “Three Evils” of terrorism, separatism and religious extremism, faced by all parties. Alarmed by US military intervention in West Asia, the organization soon took on anti-hegemonic tones, asserting that American/Western influence was to be excluded from this region. It also began to serve as a platform for the championship of a multipolar world order, and an antithesis of Western values, as represented by the maritime democracies of the US-alliance network. Washington’s request for SCO Observer status was denied and the organization consolidated itself as an exclusive six-member plurilateral arrangement until 2017. At this point former Observer States India and Pakistan were admitted

⁹ “Joint Declaration by the People’s Republic of China and the Russian Federation, Adopted at Beijing on 25 April 1996,” 2 May 1996, United Nations General Assembly, A/51/127, <https://undocs.org/pdf?symbol=en/A/51/127>; ‘Treaty of Good-Neighborliness and Friendly Cooperation Between the People’s Republic of China and the Russian Federation,’ 24 July 2001, https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/t15771.shtml.

to the club, thus significantly expanding the extent of its reach across the whole of eastern Eurasia. In addition, Afghanistan, Belarus, Iran, and Mongolia currently hold Observer status, whilst Armenia, Azerbaijan, Cambodia, Nepal, Sri Lanka, and Turkey, are Dialogue Partners, thus indicating the “network” facet of the SCO alignment, and clearly demonstrating its powers of “attraction” for other regional states.

The eight full members with China and Russia (and now India) at its core, account for approximately half the world’s population, about 80% of the Eurasian Landmass, a quarter of world GDP and around 20% of total world military expenditure.¹⁰ The SCO bloc stretches across the “Heartland” of the Eurasian continent, thus providing a geopolitical counterweight to the “Rimland” of US maritime allies. It is frequently mischaracterised as an “Asian NATO” or “alliance of the East,” but this fails to capture its novelty as an organization which superintends a “web” of bilateral strategic partnerships between the members. And whilst it includes a high degree of security cooperation on both traditional and non-traditional security threats, it does not entail a mutual defence pact (as per alliances). Thus, it conforms to the definition of a strategic partnership as “a form of enhanced bilateral cooperation between two states (or other actors) that brings them into closer alignment on security and economic issues in order to reduce uncertainties and aggregate joint capabilities.”¹¹ In addition to the web of strategic partnerships upon which it rests, an intricate organizational apparatus has been fabricated, including a Heads of State Council and a Heads of Government Council; the highest decision-making bodies, and two permanent organs; the Secretariat and the Regional Anti-Terrorist Structure (RATS). It now operates across a range of diplomatic, security, economic, (including joint energy projects, new financial architecture, and development funds), intelligence, cyber, and even social-cultural, areas. It therefore represents a new and, in some ways, “hybrid” form of security alignment, quite distinct from alliances.

Until the present, the organization has been dominated by China, with Russia as a nominal co-equal leader (though the accession of India will potentially dilute this influence), and has been seen by many analysts as the prototype of the kind of institutional apparatus that accurately reflects Chinese values and interests. According to Swagata Saha “China has been attempting to shape a non-Western security grouping to counterbalance NATO and allow China more room for military action in Asia.”¹² Thus, the SCO in some ways serves as a backstop to Chinese outward assertiveness directed toward its Asian neighbours (e.g. SCS, Taiwan, Japan), whilst covering Russia’s aggression in Eastern Europe. Though the internal parties (excepting India-Pakistan) have amicably resolved their border disputes, both China and Russia have territorial disputes with their Asian neighbours (e.g. Northern Territories, SCS). And while the SCO claims to prioritise non-traditional security issues (the “Three Evils”) it engages in high-intensity warfighting exercises (“Peace Missions”) involving frontline military capabilities (with a degree of inter-operability between members states forces, centered upon Russian weapon platforms, or variants thereof). On the basis of such activities it aims to advance an alternative to Western ideology, with Russia and China cooperating diplomatically (through the United Nations Security Council (UNSC)) to advance a multipolar order and resist the liberal international order represented by the US and its allies. Its internal system principle is based upon the “Shanghai Spirit”—a set of internal norms that guide its interaction with external parties. According to

¹⁰ World Bank, “Data-GDP (current US\$) 2018,” <https://data.worldbank.org>; Stockholm International Peace Research Institute, Military Expenditure Database 2018, <https://www.sipri.org/databases/milex>.

¹¹ Thomas S. Wilkins, *Security in Asia Pacific: The Dynamics of Alignment* (Boulder: Lynne Rienner, 2019), p. 125.

¹² Swagata Saha, “The Future of the Shanghai Cooperation Organisation,” *East Asia Forum*, 17 October 2014.

the SCO Charter, this encompasses: “mutual respect of sovereignty, independence, territorial integrity of States and inviolability of State borders, non-aggression, non-interference in internal affairs, non-use of force or threat of its use in international relations, seeking no unilateral military superiority in adjacent areas.”¹³ Though it claims not to target any other country, in reality, this represents an effort to challenge and revise the international order in line with the preferences of the authoritarian powers, and to mask active efforts to destabilize the US rules-based order above.

But despite its formidable potential, and clear representation as an alternative pole of power to the US H&S network, the organization faces significant internal challenges. Firstly, the recent expansion to include India (and Pakistan), weakens Beijing’s heretofore dominant position as *de facto* leader of the SCO. Instead of a Sino-Russian leadership dyad at the core, now India will make it a triad. And though New Delhi subscribes to certain aspects of the SCO worldview such as multi-polarity, and shares notions of non-interference and the dangers of the “Three Evils”, India is a democracy in many ways closer to Western traditions, and which, despite its now misnomered “non-alignment” policy, is closely aligned with the extended US-alliance network as well. Moreover, China and India (Arunachal Pradesh), as well as India and Pakistan (Kashmir), have territorial disputes, that could threaten the internal integrity of the SCO. Whether this will weaken the SCO’s cohesion, and whether it will transform it into a less effective and united multilateral security dialogue forum (“talk shop”), instead of a coherent alignment bloc, remains to be seen. Secondly, the importation of the “Indo-Pak” problem—the fact that two members are actually antagonists, rather than allied or aligned, threatens to undermine the internal security of the SCO in potentially combustible ways. Lastly, Western analysts in particular have pointed out that the Sino-Russian Strategic Partnership, heretofore the “engine” of the SCO is also riven with contradictions, with Moscow fearing an increased Chinese strategic presence on its borders and in Central Asia, and resentful of Chinese economic expansion, sometimes outside of the SCO framework, such as the Belt and Road Initiative (BRI), which vies with the Russian-led Eurasian Economic Union (EEU). This indicates that the alignment functions as much as a “pact of restraint”—preventing one another from aligning with the US, for example, than a genuine confluence of long-term strategic interests, let alone, shared values.

The ASEAN security community network

In some ways caught in-between the Sino-US-led “blocs,” the ASEAN security community seeks to drive internal (intramural) cooperation between South East Asian (SEA) states and safeguard their mutual external interests through strength in numbers. ASEAN was initially formed as a regional intergovernmental organization in 1967 at the height of the Cold War, to protect itself against outside interventions by the Communist powers (Vietnam, China) who threatened to destabilise newly independent but fragile post-colonial states faced with a multitude of internal nation-building challenges. With the end of the Cold War tension in SEA, the organization experienced a “second birth” with the accession of formerly antagonistic CLMV states in the 1990s (Cambodia, Laos, Myanmar, and Vietnam). Based upon the ASEAN Charter (2007) and under the (current) banner of “ASEAN 2020” it aims at building an “ASEAN Community” based upon a tripod of: Political-Security community (of most relevance here), Economic community, and Socio-cultural community. Under this triad it engages in a range of intergovernmental cooperation and facilitates economic (including an ASEAN Free Trade Area), political, security, military, educational, and sociocultural integration activities. There is no simple definition of a “security community,” but Raimo Väyrynen defines it as “a collective arrangement in which its members have reasons to trust that the use of military and economic coercion in their mutual

¹³ Shanghai Cooperation Organization, “Charter of the Shanghai Cooperation Organization,” p. 3.

relations is unlikely.”¹⁴ In other words, though they specifically eschew a collective defence pact (as per alliance), they conceive of their security as being advanced collectively. This makes this form of security alignment, quite distinguishable from the alliance paradigm.

Though ASEAN was primarily concerned with incubating intramural cooperation between its membership until the 1990s, it henceforth took on an external orientation as a discernible alignment of states, seeking to shape the wider regional security order in the Indo-Pacific. This “network” building, (usually referred to as “ASEAN-plus”) is conducted by means of a wide array of multilateral institutions (i.e. security architecture) that engage with external parties, such as the ASEAN Regional Forum, East Asian Summit, ASEAN+3, and ASEAN Defence Ministers Meeting+ (ADMM+), plus the Regional Comprehensive Economic Partnership (RCEP). Through this extended network the ASEAN members themselves seek to “enmesh” other regional states, especially the major powers, in their own normative framework (see below).

ASEAN is primarily a vehicle to safeguard the security interests of the small and medium-sized SEA member states both internally and externally, through intramural cooperation, and strength in numbers, respectively. When combined they count a population of approximately 651 million and aggregated GDP of about \$3trn and total military budget of \$40bn.¹⁵ They employ the organization and its extended institutional network as a “shield” against external interference in SEA, and as a way of mediating tensions between SEA and external powers, including the former two alignment blocs, with varying degrees of success. They also prioritise non-traditional security issues such as transnational crime, unregulated population movements, environmental disasters, infectious diseases, food security, transnational pollution, piracy, and terrorism. They have championed a package of “norms,” in part an assertion of “Asian” versus “Western” values, known as the “ASEAN Way.” This entails “the importance of neutrality; sovereignty and territorial integrity; the peaceful settlement of disputes; informal, non-confrontational negotiations; and the promotion of domestic stability and social harmony—which together underscore the importance of state autonomy and non-interference in the affairs of other states.”¹⁶ And they have sought to “export” these norms across the larger Indo-Pacific theatre by means of their ASEAN-plus institutional architecture, including gaining external states adhesion to the Treaty of Amity and Cooperation (TAC); a loose form of non-aggression pact. This attempt to “enmesh” external parties in an ASEAN-led normative framework—lacking the military or economic weight to otherwise influence external states—has had some limited success in underwriting their claim to “ASEAN centrality” in regional security affairs.

But the ASEAN security community suffers from a range of limitations as a pole of alignment in the Indo-Pacific. Firstly, it lacks the critical mass of power resources and capabilities to assert its influence in the face of any opposition by the other alignment blocs, or individual powerful states. In particular, despite some aspirations to integrate SEA’s defence industries, it has no collective defence agreement or combined military capabilities, as in the H&S (and to a minor degree, in the SCO). For this reason, it has devoted its security diplomacy toward normative efforts at confidence-building and cooperation through the medium of ASEAN-plus institutions as a means to shape regional order. Secondly, perhaps because of these issues, ASEAN (and its extended network) have come in for sustained criticism for a lack of effectiveness in the security sphere. The ASEAN-plus institutions are not seen as efficient security providers by

¹⁴ Raimo Väyrynen, *Stable Peace through Security Communities?: Steps towards Theory-Building* (The Joan B. Kroc Institute for International Peace Studies, 2000), p.166.

¹⁵ World Bank, “Data-GDP (current US\$) 2018,” <https://data.worldbank.org>; Stockholm International Peace Research Institute, Military Expenditure Database 2018, <https://www.sipri.org/databases/milex>.

¹⁶ Richard Stubbs, “The ASEAN Alternative? Ideas, Institutions and the Challenge to ‘Global’ Governance,” *The Pacific Review* 21, no. 4 (2008), p. 451.

regional parties, including its members states, who retain national defence capabilities and a gamut of security agreements with external powers, especially the US (some can be counted as part of the original H&S, such as Thailand and the Philippines, as well as new strategic partners in the extended network, such as Singapore and Vietnam, for example). ASEAN organs have not successfully addressed even non-traditional security challenges in the region such as haze pollution, the refugee crisis in Myanmar, and human rights concerns, though they have had greater success on counter-terrorism, and anti-piracy operations. They have certainly failed to deal with traditional security disputes such as the SCS as a meaningful alignment of states. Lastly, questions remain as to the sustained momentum of ASEAN toward its aspiration to become a genuine “Security Community,” both due to the stark diversity in political makeup and national power between its members, and some minor territorial disputes between member states (e.g. Preah Vihear temple, between Thailand and Cambodia). But external factors have placed pressure upon its proclaimed “neutrality” toward great power rivalry and territorial disputes in the region. Examples of compromised neutrality include Cambodia’s scuttling of the 2016 ASEAN Summit declaration regarding the SCS as a result of Chinese diplomatic pressure on Phnom Penh.¹⁷ This cruelly exposed the divisions within the ASEAN membership and its inability to act cohesively as a united front, thus calling into question the actual coherence of ASEAN as a meaningful security alignment.

Conclusion

It is conventional wisdom among analysts that the “noodle-bowl” of multilateral institutions of various stripes have not been fully effective in addressing the pressing multifarious challenges the region faces: great power rivalry, nuclear proliferation, maritime and territorial disputes (though it may fare better at dealing with non-traditional security issues such as piracy, and trans-national criminal organizations). Nor have sporadic efforts to build a “regional community” (sometimes predicated upon institutional security architecture) fared any better. One thinks of the failed “East Asian Community” of former Prime Minister Hatoyama Yukio, or the “Asia-Pacific Community” of former Prime Minister Kevin Rudd, for example.

Thus, in place of these, this article has suggested that looking at the three principle alignment groupings in the region is an alternative to understanding how security in the regional is structured and operates to maintain regional order. The strong adherence of states within these alignments to each of these groupings also testifies that they normally prioritise their alignments as their most effective form of security provision in an uncertain and unstable security environment. As this article has demonstrated, these new alignments can take the form of reconfigured alliances in the US case, or hybrid strategic partnership/plurilaterals, like the SCO, or security communities, in the ASEAN case. In other words, security alignment does not always and only occur through formal military alliances, but through alternative “non-alliance” means, such as the SCO and ASEAN. Additionally, the reach of these three alignment groupings is extended, by their respective efforts to “network” beyond their core memberships. For example: the American-led H&S system seeks to attract additional “strategic partners” (e.g. Singapore, Vietnam, India), whilst the SCO includes a range of Observer and Dialogue Partners, and ASEAN heads a suite of “ASEAN plus” institutional offshoots (e.g. EAS, ARF etc.). It is also important to recognise that alignments can vary in depth and cohesion over time, and can evolve and transform. Moreover alignments are not always “water-tight,” with some states participating in multiple alignments (e.g. India is a member of the SCO and a Strategic Partner with the US/Quad), thus complicating the situation. Also, interestingly the SCO and ASEAN also increasingly

¹⁷ Manuel Mogato, Michael Martina, Ben Blanchard, “ASEAN Deadlocked on South China Sea, Cambodia Blocks Statement,” *Reuters*, 25 July 2016.

engage in cooperative activities, and partially share a similar worldview.¹⁸ A recognition of importance of the alignment phenomenon for understanding the security landscape of the Indo-Pacific, as well as an appreciation of the transforming nature of alignments themselves, gets us closer to understanding the security structures upon which regional security order is ultimately predicated.

¹⁸ “Memorandum of Understanding Between the Secretariat of the Association of Southeast Asian Nations (ASEAN Secretariat) and the Secretariat of The Shanghai Cooperation Organization (SCO Secretariat),” 21 April 2005, <https://asean.org/wp-content/uploads/images/ASEAN-SCO-MOU.pdf>.

China Maritime Strategy Since 2018: Tactical Appeasement or Strategic Evolution?

Valérie Niquet*

Abstract

Tensions in the South China Sea have not disappeared, although China did not take further possession of disputed features since 2017. Actually, China's position has not changed, and the appeasement moves towards Japan, hoping for a decoupling between economic and strategic issues, or towards Southeast Asian nations, are tactical moves. An attempt to limit the negative consequences on China's image and counter the formation of regional and extra-regional coalitions. At the meantime, faced with recent developments, a debate has emerged in China, between those who defend Xi Jinping's assertive strategy, and those who now consider that it has had negative consequences for China. The most likely scenario in the short term is, therefore, that of stabilization with alternating periods of tensions and appeasement, depending on the reaction of Beijing's "adversaries," first and foremost the United States, to China's moves in the South and East China Seas. The risk of a large-scale military confrontation is unlikely in the current state of the balance of power, unless the United States chooses to favor an appeasement strategy with the PRC that could be interpreted in Beijing as a show of weakness or disengagement. This potentially very destabilizing possibility cannot be completely ruled out. However, by withdrawing from the South China Sea, the United States would run the risk of weakening its overall posture, ultimately compromising its fundamental interests in an area of vital strategic and economic importance.

The People's Republic of China (PRC) did not reverse its territorial objectives in the South China Sea. It occupies the entire Paracel Archipelago and seven "features," not recognized as "islands," in the Spratly Archipelago. In 2018, it continued filling and building work on the rocks or banks that China controls.¹ However, Beijing did not carry out any new occupation and, at the 31st Association of Southeast Asian Nations (ASEAN) Summit held in Manila in November 2017, it signed the Treaty of Friendship and Cooperation with ASEAN. It also declared its readiness to resume negotiations on the implementation of a Code of Conduct, initiated without significant real progress in 2013.²

In August 2018, a new proposal for the Code of Conduct, including the protection of the marine environment in the South China Sea, which has been severely degraded by China's

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¹ In the Spratly Archipelago, the People's Republic of China has occupied Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Hughes Reef, Johnson Reef, and Subi Reef since 1988 and Mischief Reef since 1995. It controls access to Scarborough Shoal without having taken the step of a formal occupation, since 2012. See <https://amti.csis.org>

² Carlyle Thayer, "ASEAN, China and the Code of Conduct in the South China Sea," *SAIS Review of International Affairs*, n° 2, 2013 https://www.researchgate.net/publication/265983542_ASEAN_China_and_the_Code_of_Conduct_in_the_South_China_Sea

dredging operations was written. However, this draft had many shortcomings. It did not precisely define the geographical scope of the South China Sea, severely limited the role of external parties, and specified that the possible signing of a Code of Conduct did not question the territorial claims of the parties involved.³

These developments, which seemed to play in favor of appeasement in the South China Sea, are, in part, the positive consequences of the 2016 judgment of the Den Hague Court of Arbitration, which rejected all Chinese claims in the South China Sea. Indeed, while refusing the validity of the Court's conclusions, China chose to stabilize its positions in Southeast Asia, rather than make further territorial progress. Beijing is also concerned about the strengthening of US engagement in the South China Sea at a time of tensed relations with Washington. In that context, Beijing's appeasement strategy—including with important neighboring countries such as Japan—proposals for cooperation on a “maritime silk route,” or attempts to divide ASEAN are part of the same agenda for the evolution of the PRC's regional strategy.

With the Philippines, despite ups and downs, the disputes are far from over. Since President Duterte came to power in June 2016, Manila has agreed not to address the issue of the decision of the Den Hague Arbitration Tribunal, which was in favor of the Philippines' claim. President Duterte implemented an appeasement strategy with China in exchange for pledges of economic assistance and access to fisheries resources for Filipino fishermen in the areas claimed by the PRC, including Scarborough Shoal.⁴ However, in 2019, incidents involving Chinese fishing boats, coast-guards, or planes around territories claimed by the Philippines in the South China Sea did not cease.⁵

China has not abandoned its ambitions in the South China Sea

While the PRC adopted a less offensive stance in 2017–2018, it has not abandoned its territorial claims and strategy to control the South China Sea. China has thus continued to militarize all the territories, sandbanks, or rocks it occupies with the construction of runways to accommodate its strategic bombers, the deployment of anti-aircraft capabilities, observation equipment (radars), and the construction of port infrastructure.⁶ In May 2018, for the first time, the first H-6K strategic bomber, capable of carrying nuclear warheads, operated from Woody Island, in the Paracel Archipelago. In April of the same year, the first LSM and LAM missiles were deployed on the backfilled rocks of Subi, Mischief, and Fiery Cross Reef.

This “operationalization” of Chinese controlled features in the Paracels and Spratlys gives Beijing extended projection capacities, to the southern part of the South China Sea, up to the borders of Indonesia, and the South Pacific. It facilitates naval and air patrols and joint-forces exercises in the area.

From a strategic point of view, the South China Sea could be transformed into a bastion for the implementation of an anti-access (A2AD) strategy designed to increase China's room for maneuver in Asia against the United States. In the event of a real conflict, the defense of islands far from the mainland, proves illusory. However, in peacetime, for “grey zone” operations involving fishing flotillas and naval law enforcement coast-guards, Chinese “artificial anchors”

³ Carlyle Thayer, “A Closer Look at the ASEAN-China Single Draft South China Sea Code of Conduct,” *The Diplomat*, 03-08-2018.

⁴ Aries A. Arugay, “The Philippines in 2017: Security Challenges in a Time of Conflict and Change,” on <http://www.nids.mod.go.jp>

⁵ China is blockading Philippine boats from accessing Scarborough and Thomas Shoals. The latest incident occurred in October 2019, prompting the Ministry of Defense to file a protest.

⁶ Kerry K. Gershaneck, “China's Plan for Conquest of the South Pacific,” 07-09-2018 on <http://asiatimes.com>

in the area offer significant opportunities. The filling work and constructions to increase the surface of China's held features also make it possible—even if China acts outside any framework recognized by international organizations like the United Nations Convention on the Law of the Sea (UNCLOS)—for Beijing to try and enforce the principle of its sovereignty over the area.

According to the *Global Times*, a nationalist newspaper often used to unofficially express opinions from the Chinese Communist Party (CCP) leadership, “China has every right to build everything it believes necessary on its territory in the South China Sea to defend its interests and security.”⁷ Beijing officially considers that the filling and militarization operations that were carried out in 2017 and 2018 are both “reasonable” and legitimate, despite the commitments made to its Southeast Asian neighbors to negotiate a draft Code of Conduct mentioning non-use of force.⁸

Maritime expansion in the South China Sea is also a priority of President Xi Jinping's more assertive strategy. This was one of the first missions assigned to a “combat ready” People's Liberation Army (PLA), with the development of the Southern Command, which controls Taiwan and the South China Sea.⁹ On October 1st 2019, for the 70th anniversary of the PRC, as in 2015 for the commemoration of the end of the war with Japan in 1945, the military parades focused on missiles. These were the DF-21D, “aircraft killer” in 2015 and the DF-41 ICBM, with a claimed capacity of multiple warheads, in 2019. Both are deterrent and part of a “communication” strategy to delay US intervention in case of a Chinese offensive, at the service of the CCP's survival strategy, in the South or East China Sea.

While China, since 2016, has been more cautious, this has not prevented the continuation of tensions in maritime areas wherever possible. This makes it more doubtful that a lasting solution based on the joint development of resources, which has often been mentioned but never implemented, will be found either in the East or South China Sea. With the multiplication of Chinese presence and exercises in the area, involving navy and coast-guard vessels, incidents have increased, involving regional and extra regional powers and the United States.

In September 2018, a collision was narrowly avoided with an American destroyer, involving a Chinese coast-guard vessel.¹⁰ In June 2019, the Philippine Secretary of National Defense protested against the sinking of a Philippine fishing boat by a Chinese coast-guard vessel.¹¹ In the Taiwan Strait, in the Northern part of the South China Sea, Beijing is also attempting to challenge the principle of freedom of navigation by intimidating vessels, including French vessels, that do not respect the PRC's unilateral territorial claims.¹² Around the Senkaku archipelago, Chinese incursions never ceased, even if they became “routine,” mobilizing Japanese naval and air patrol capacities.

Beijing has the largest coast-guard fleet in the world, with more than 200 vessels, including several new large vessels over 1500 tons. Since December 2018, the coast-guard has also been

⁷ Zhuang Guotu, Xiamen University, in Zhao Yusha, “Land Reclamation to Expand in South China Sea Islands,” *Global Times*, 05-02-2018.

⁸ “China National Marine Data and Information Service Report” in “Chinese Report Says South China Sea Islands Expanded ‘Reasonably,’” *Reuters*, 25-12-2017.

⁹ “‘Prepare for War’, Xi Jinping Tells Military Region that Monitors South China Sea, Taiwan,” *South China Morning Post*, 26-10-2018.

¹⁰ <https://gbtimes.com/naval-incident-between-chinese-and-us-destroyers-in-south-china-sea-causes-more-friction>

¹¹ “South China Sea Collision Talk Threatens to Rock China Philippines Relations,” *Associated Press*, 12-06-2019.

¹² “Naval incident between France and China,” *AFP*, 25 April 2019.

placed under the direct authority of the Central Military Commission headed by Xi Jinping.¹³ An illustration of Beijing's "fuzzy" strategy, that restricts the use of PLA navy in order to remain in the framework of "civilian" law enforcement operations, and avoid being accused of "military aggression." From 2011 to 2017, 75% of the 53 major incidents that occurred in both the South and East China Sea, involved coast-guard vessels.¹⁴

A constant strategic challenge for the countries of the region

All countries in the region are concerned by a strategic challenge that can be turned "on" or "off" by the Chinese leadership according to their priorities. In spite of not being officially concerned by China's territorial claims, Indonesia has reaffirmed its commitment to reinforcing the protection of its maritime sovereignty, particularly concerning fishing rights and—potentially—hydrocarbon resources at the borders of its exclusive economic zone (EEZ). In 2017, Indonesia published new maps renaming the South China Sea, where incursions of Chinese vessels had increased, "North Natuna Sea," to confirm its sovereignty over the region.¹⁵

For Malaysia, a party to territorial claims over part of the South China Sea, the issue is considered a major problem both by the political leadership and the armed forces. While Malaysia used to favor a less confrontational posture with China, the new Malaysian authorities, since the re-election of Prime Minister Mohamad Mahathir in 2018, have reiterated their opposition to the concept of a "nine-dash line" claimed by Beijing. They also reasserted their commitment to the law of the sea based on UNCLOS and negotiated settlement involving all regional actors, without use of force or coercion.¹⁶

Malaysia also denounces the incursions of Chinese civilian and military vessels. These incursions were reported to have increased by 30% in 2017, to test the Malaysian authorities' willingness to react. Since then, they did not cease, sometimes involving dozens of fishing boats. For Malaysia, the issue of the South China Sea is all the more vital as it divides East Malaysia, where the States of Sabah and Sarawak are located, and Peninsular Malaysia. China is trying to favor a bilateral agreement, mobilizing, in particular, the attractiveness of its economic power as in the case of the Philippines, but mistrust persists.¹⁷ Far from accepting China's offers, Prime Minister Mahathir chose to renegotiate an infrastructure building agreement signed by his predecessor.

For its part, the Philippines is still on the front line of confrontations with China in the South China Sea, although President Duterte's election partially changed the situation in relation to the PRC. The new President has chosen to appease Beijing and try to take advantage of China's economic opportunities. Since his election, there have been many high-level exchanges between Beijing and Manila, including President Xi Jinping's visit to the Philippines in 2018.

At the same time, the Philippine President, who claims that he cannot forcefully oppose Chinese demands, particularly around Scarborough Shoal, is also seeking to maintain a balance with other regional and extra-regional powers, including Australia and Japan. The latter has provided the Philippines with reformed coast-guard patrol vessels as part of capacity building cooperation with Manila. Similarly, the links between the Philippines and the United States have

¹³ Previously, the coast-guard was placed under the authority of the oceanographic safety authority.

¹⁴ <https://amti.csis.org>

¹⁵ Gilang Kembara, "Security Outlook of the Asia-Pacific Countries and its implication for the Defence Sector in: Indonesia" on <https://www.nids.mod.go.jp>

¹⁶ Thomas Daniel, "Key Issues Impacting Malaysia's Security Outlook" on <https://www.nids.mod.go.jp>

¹⁷ Bhavan Jaipragas, "Malaysia Looks to Chinese leadership, but not on South China Sea" on <https://www.scmp.com/week-asia/geopolitics/article/2168119/malaysia-looks-chinese-leadership-not-south-china-sea>

not been severed. Strengthened since the election of Donald Trump, who does not stress the “human rights” issue, and the involvement of US forces in controlling radical Islamist insurgency in Mindanao in 2017.¹⁸

Another frontline State, Vietnam, places sovereignty issues in the South China Sea against China at the forefront of its strategic concerns. For Hanoi, the stakes are multidimensional, involving issues of territorial sovereignty, including Beijing’s pressure to ban all drilling or exploration in areas claimed by the PRC, and Beijing’s drilling operations in areas under its control. In July 2017, Vietnam had to suspend its exploration operations in the Block 136-03 under pressure from China, and in 2019, China conducted its own exploratory operations in areas claimed by Vietnam.

Beyond territorial issues, the question of the delimitation of EEZs, and free access to potential resources is also essential for a state like Vietnam. Finally, as the Den Hague Tribunal has demonstrated, global legal issues concerning the law of the sea are also at stake. Like the Philippines, in the face of coercive actions by the PRC, Vietnam is also pursuing an active policy of strategic balance towards the United States and Japan.¹⁹

The issue of EEZ delimitation and access to resources, be it oil, gas, or fishing, is also a major issue, apart from the protection of territorial sovereignty for Japan. In the East China Sea, China’s official claims on EEZ extend up to the shores of Okinawa, including the whole continental shelf. Japan suspended its exploration activities in the East China Sea, despite China’s own drilling and access to resources across the dividing line between the two EEZs.

Did Chinese developments in the South and East China Seas change the status quo?

China has mobilized a diversified range of instruments, involving coercion, economic cooperation, diplomatic pressure and legal warfare, to change the status quo in the South and East China Seas. If successful, that multilayered strategy could be applied to all areas where Beijing has claims not recognized by international law. This could also potentially concern areas in the Arctic, where China imposed its concept of “quasi-Arctic State.”

However, the PRC does not go beyond limits that could raise the risk of an external intervention. At the legal level, Beijing tried—without success—to impose a maximalist interpretation of Article 58 of UNCLOS concerning the military activities by foreign vessels on EEZs.²⁰ China ratified UNCLOS in 1996, but with reservations on special economic zones and the continental shelf following its own “maritime law” adopted by the National Assembly in 1998.

At a more global level, China’s position on the implementation of UNCLOS sheds light on how Beijing views the international system and the liberal order. While the PRC has signed and ratified UNCLOS and does not seem ready to withdraw from it, compliance with the rules initially accepted depends on a constantly shifting balance of power and the interests unilaterally defined by the Chinese authorities themselves.

Similarly, with even weaker legal foundations, China is trying to extend the concept of “historical rights” to impose recognition of its claims in the South and East China Seas. These legal maneuvers are accompanied by filling and construction activities to support Chinese claims and consolidate its presence. The objective is to impose a “fait accompli,” that could change the position of Beijing’s neighbors and the international community.

However, despite these efforts, that also attempt to impose the idea that China’s strategy and

¹⁸ Aries A. Arugay, op.cit.

¹⁹ Tran Truong Thuy, “Tempering the South China Sea Slow Boil: Expanding Options for Evolving Disputes,” <https://www.nids.mod.go.jp>

²⁰ https://www.un.org/depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm

raise are ineluctable, Beijing has suffered several setbacks. The most important, both legally and in terms of image, is the judgment of the Den Hague Court of Arbitration in 2016. China used its full economic weight to limit the severity of the EU's joint declaration, and the judgment does not include any mandatory implementation clause. However, all China claims have been rejected and, since then, while rejecting the very principle of the legitimacy of the Tribunal, Beijing has limited its use of the concept of "nine-dash line." Also, the decision was very positively received in Southeast Asia and Japan, further highlighting the isolation of the PRC on the issue of the South China Sea. In Europe, if some countries played a role in toning down the EU declaration, the image of the PRC has been degraded, and the EU's China strategy is far more cautious than it used to be.²¹

Above all, the more aggressive strategy followed by Beijing since Xi Jinping came to power, despite the economic opportunities offered by the BRI (Belt and Road Initiative) designed to regain the support of the countries in the region, has in turn triggered a backlash that aim, at a minimum, to rebalance Chinese power. At the ASEAN level, regional initiatives have been put in place, which, while not openly targeting Beijing for diplomatic reasons, take into account Chinese progresses in the region. In Indonesia, the document defining the country's new ocean policy emphasizes maritime defense, in response to new risks related to trafficking and the environment. The naval forces are expected to be significantly strengthened with the acquisition of 90 new vessels, including 42 deep-sea patrol vessels and 12 submarines.²²

The evolution is the same in Malaysia, reinforced by the return to power of Prime Minister Mahathir, who has adopted a less conciliatory stance regarding China. Here too, new resources to strengthen the capacity of the coast-guard are planned to deal with Chinese incursions.²³

In June 2017, Indonesia, Malaysia, and the Philippines established trilateral maritime patrols officially designed to combat piracy in the Sulawesi area, but which also aim to better control the "maritime borders" of these three States, particularly in the face of incursions by fishing flotillas. Beijing officially protested on behalf of its "historic fishing rights" but could not stop the initiative.²⁴

In the East China Sea however, the ban on any landing or fishing around the Senkaku islands implemented by the Japanese authorities for the sake of appeasement, the "routine" activities of Chinese vessels in or at the limit of territorial waters surrounding the islands, or the Japanese decision not to pursue gas exploration activities, has sometimes been interpreted by Chinese strategists as a success in imposing a *de facto*—if not *de jure*—change of status quo.

Towards the internationalization of the conflict

Above all, while the PRC hoped to be able to contain the management of tensions in the South and East China Seas at the bilateral level, more favorable to its interest because of the asymmetry of economic and military power with all its neighbors, we are witnessing an increased internationalization of the conflict. The reactions, and the opposition to China's actions and claims extend well beyond the regional framework.

In the United States, President Donald Trump tends to advocate the defense of American interests above all else (America First). However, after some considerations, he adopted a much more hardline position both at the economic and strategic level. Beijing, contrary to initial "hopes," had failed to "deliver" both on trade and North Korea, which in part explains the Trump administration's change of attitude regarding China.

²¹ https://ec.europa.eu/commission/news/eu-china-strategic-outlook-2019-mar-12_en

²² Gilang Kembara, *op.cit.*

²³ Thomas Daniel, *op. cit.*

²⁴ *Idem.*

The incident that occurred in September 2018 between a Chinese vessel and an American destroyer, followed by other incidents in the South China sea involving the navy and air force, fortified American will to enforce their role as strategic stabilizer in the region, with the resumption of Freedom of Navigation Operations (FONOPs) in waters claimed by Beijing. In May 2019, the United States sent twice destroyers within the 12 miles limit of Territories claimed by Beijing, and overflights are increasing.²⁵

In 2018, Washington also decided not to invite Chinese forces to participate in the joint “Pacific Rim” exercises that had been opened two years earlier as a sign of goodwill. The United States is also pursuing a strategy of rapprochement with other States in the region facing Chinese actions, first and foremost, Vietnam and the Philippines. Moreover, while not directly linked to this issue, US trade sanctions against the PRC also contributes to the strategy of pressure exerted on Beijing.

This strategy is also implemented in coordination with its Japanese ally, which, since the adoption of new, more flexible military export rules in 2014, has been building the capacity of Vietnam's and the Philippines' coast-guard fleet and participating in the training of Vietnamese submariners. More concretely, the adoption of new defense laws in 2015 and 2016 allows, with the right of collective self-defense, the participation of self-defense forces in joint patrols, including in the South China Sea. In the fall of 2018, Japan sent a submarine to the South China Sea for the first time.²⁶ In June 2019, an Izumo multi-purpose carrier, the largest ship in the Maritime Self-Defense Force (MSDF), participated in exercises with the United States in the South China Sea.

Japan shares with its neighbors in Southeast Asia the same concerns about China's ambitions in the East or the South China Sea. In 2018, Tokyo adopted new guidelines for defense capacity development that strengthened its projection capabilities, including the use of Izumo helicopter carriers as aircraft carriers under certain conditions, and the acquisition of longer-range (300 km) ballistic missiles based in Okinawa to protect faraway islands.²⁷ During the Shangri-La Dialogue held in Singapore in 2019, Japan's Defense Minister has been very firm on the issue of the South and East China Seas, recalling the conclusions of the Den Hague Tribunal. This position coincides with the French one and is one of the foundations of Paris adhesion to the concept of Free and Open Indo-Pacific (FOIP).

Though far geographically, the EU, where France plays a leading security role, has also seen its stance towards China evolve in a less favorable direction. Chinese strategy in the South China Sea has made a significant contribution to that evolution by challenging fundamental principles, including the principle of peaceful conflict resolution, to which the EU is particularly committed. The countries most involved in the region—first and foremost France, which has its territories in the Indian Ocean and the Pacific—has direct sovereign interests in both oceans and regularly navigates the South and East China Seas, have adopted a firm stance accompanied by concrete measures.

In Singapore, in June 2019, the Minister of the Armed Forces, Florence Parly, recalled France's commitment to the principle of freedom of navigation and overflight wherever international law permits. Similarly, President Macron's speech in Australia in 2017 and again in 2019, which mentions France's active support to the principle of FOIP, is a direct response to China's more assertive maritime strategy. The same applies to the regular passage of French—with UK and EU observers onboard—and British vessels through the South China Sea, challenging warnings

²⁵ Jesse Johnson, “US Sails Massive F-35-Laden Warship in Disputed South China Sea,” *Japan Times*, 09-04-2019.

²⁶ <https://asia.nikkei.com/Opinion/Japan-versus-China-in-the-South-China-Sea>

²⁷ <https://www.japantimes.co.jp/news/2018/12/17/national/new-defense-guidelines-prioritize-long-range-missiles-defense-japans-outlying-islands/#.XGbtJNKjaY>

from China in order to uphold the rules of freedom of navigations, including military ships, in non-territorial waters.

Conclusion

Tensions in the South China Sea have not disappeared, although China did not take further possession of disputed features since 2017. Actually, China's position has not changed, and the appeasement moves towards Japan, hoping for a decoupling between economic and strategic issues, or towards Southeast Asian nations, are tactical moves. An attempt to limit the negative consequences on China's image and counter the formation of regional and extra-regional coalitions.²⁸

The fundamental causes of the tensions did not vanish. Concerning resources, beyond energy, access to fishing grounds is becoming increasingly important and is the cause of a majority of incidents with other countries.²⁹ Beyond that, the question of power rivalry with the United States is an essential factor. Despite uncertainties regarding US engagement in Asia, since Donald Trump came to power, this factor had positive results in checking a more assertive Chinese strategy, as the PRC constantly takes into account in its calculus the actual balance of power.

For Beijing, the unpredictability of the American President increases the risk of incidents and requires greater caution. In terms of principles, the stakes for all powers outside the area are too high in terms of freedom of navigation, respect for the rule of law and the defense of vital economic interests, for the process of internationalization of the conflict to be checked.

Faced with these developments, a debate has also emerged in China, between those who defend Xi Jinping's assertive strategy, and those who now consider that it has had negative consequences for China, confronted with multiple issues from US trade war to the situation in Hong Kong, and with no means to achieve its ambitions if it faces stiff resistance, particularly from the United States.

The most likely scenario in the short term is, therefore, that of stabilization with alternating periods of tensions and appeasement, depending on the reaction of Beijing's "adversaries," first and foremost the United States, to China's moves in the South and East China Seas. The risk of a large-scale military confrontation is unlikely in the current state of the balance of power, unless the United States chooses to favor an appeasement strategy with the PRC that could be interpreted in Beijing as a show of weakness or disengagement.

This potentially very destabilizing possibility cannot be completely ruled out. However, by withdrawing from the South China Sea, the United States would run the risk of weakening its overall posture, ultimately compromising its fundamental interests in an area of vital strategic and economic importance.

²⁸ Monika Chansoria, "Regional Cooperative Security in the Indo-Pacific: Synergizing Consultative Mechanisms across the Indian Ocean, East China Sea, South China Sea, and the Western Pacific" on https://www.jiia-jic.jp/en/japanreview/pdf/JapanReview_Vol1_No2_03_Monika%20Chansoria.pdf

²⁹ Incidents involving China occur in the South and East China Seas but also in the Pacific, off the coast of Africa and Latin America.

Upcoming Issue of the

JAPAN REVIEW

Volume 3, Number 3-4 (Spring 2020)

**Commemorating the Centennial Anniversary of
Japan's Racial Equality Proposal
—Remaking the International Order after the WWI—**

Published by the Japan Institute of International Affairs

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