

# Advancing a Rules-based Maritime Order in the Indo-Pacific

*Edited by*

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#### **Front cover image**

The aircraft carrier USS Ronald Reagan (CVN 76), center left, and the Japanese helicopter destroyer JS Hyuga (DDH 181), center right, sail in formation with other ships from the U.S. Navy and Japan Maritime Self-Defense Force (JMSDF) as aircraft from the U.S. Air Force and Japan Air Self-Defense Force fly overhead in formation during Keen Sword 2019 in the Philippine Sea. Keen Sword 2019 is a joint, bilateral field-training exercise involving U.S. military and JMSDF personnel, designed to increase combat readiness and interoperability of the U.S.-Japan alliance.

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### About This Volume

Authors of this volume participated in the Indo-Pacific Maritime Security Expert Working Group's 2021 workshop that took place, virtually on March 23-24. The working group, composed of esteemed international security scholars and maritime experts from Japan, the United States, and other Indo-Pacific states, was formed to promote effective U.S.-Japan cooperation on maritime security issues in the region through rigorous research on various legal interpretations, national policies, and cooperative frameworks to understand what is driving regional maritime tensions and what can be done to reduce those tensions. The workshop's goal is to help generate sound, pragmatic and actionable policy solutions for the United States, Japan, and the wider region, and to ensure that the rule of law and the spirit of cooperation prevail in maritime Indo-Pacific.

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# TABLE OF CONTENTS

1 INTRODUCTION: ADVANCING A RULES-BASED MARITIME ORDER IN THE INDO-PACIFIC	
Jeffrey Ordaniel	1
2 STRENGTHENING MARITIME CRISIS PREVENTION IN NORTHEAST ASIA: A FOCUS ON SUBNATIONAL AND NONSTATE ACTORS	
Shuxian Luo	4
3 THE GAPS IN JAPANESE MARITIME SECURITY LAW AND THE SENKAKU SITUATION	
Yurika Ishii	12
4 MARITIME SECURITY IN THE EAST CHINA SEA: JAPAN'S PERSPECTIVE	
Atsuko Kanehara	16
5 USE OF FORCE IN INTERNATIONAL LAW AND THE NEW CHINA COAST GUARD LAW	
Nguyen Thi Lan Huong	21
6 ARE WE READY FOR THE QUAD? TWO CONTRADICTIONARY GOALS	
Kyoko Hatakeyama	28
7 MODERNIZING U.S. ALLIANCES	
Virginia Watson	34
8 MARITIME GOVERNANCE CAPACITY BUILDING: A U.S.-JAPAN ALLIANCE AGENDA FOR RULE OF LAW IN THE INDO-PACIFIC	
John Bradford	38
ABOUT THE AUTHORS	44

## Introduction

# Advancing a Rules-Based Maritime Order in the Indo-Pacific

Jeffrey Ordaniel<sup>1</sup>

Over the past decade, there has been a growing call for greater rule of law in maritime Indo-Pacific. From Washington, Tokyo and Canberra, to the capitals of Southeast Asia, leaders and policymakers have been constantly stressing the importance of adherence to the principles of international law, and to cooperate, bilaterally and multilaterally to address maritime challenges. The Association of Southeast Asian Nations (ASEAN) has been, year-after-year and statement-after-statement, constantly repeating the same refrain regarding “the need to pursue peaceful resolution of disputes in accordance with the universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea (UNCLOS).”<sup>2</sup> During their first summit meeting, in April 2021, U.S. President Joe Biden and Japanese Prime Minister Yoshihide Suga expressed their shared opposition to “any unilateral attempts to change the status quo in the East China Sea,” and reiterated “shared interest in a free and open South China Sea governed by international law, in which freedom of navigation and overflight are guaranteed,” consistent with UNCLOS.<sup>3</sup> But despite the seeming regional consensus, achieving a rules-based maritime order appears farther than ever. This volume gathered expert voices to critically assess issues of maritime law and policy to better understand what drives maritime tensions in the region, and what can be done to reduce them, to achieve greater rule of law.

But why is a rules-based order so desirable and critical for maritime security in the Indo-Pacific? First, the region is characterized by a large number of enclosed or semi-enclosed water regions, which Article 122 of UNCLOS defines as “a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet, or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.”<sup>4</sup> This fact has significant geopolitical implications. It means maritime entitlement dispute would inevitably be a common feature of almost every bilateral relationship in the region. Indeed, every body of water in the Indo-Pacific is contested. The alternative to rules-based management and resolution of these offshore territorial

disputes and overlapping maritime entitlement claims is the use of coercion and force.

Second, maritime security is of paramount importance to the economies of littoral states in Asia, and beyond. It is estimated that nearly half of all commercial sea trade is delivered through the region’s waterways. The Malacca Strait alone is traversed by at least 25% of the world’s commercial shipping. In the South China Sea, where multiple states have overlapping claims, the Center for Strategic and International Studies’ ChinaPower Project found that an estimated US\$3.4 trillion in trade passed through it in 2016.<sup>5</sup> That figure constitutes about 21 percent of global trade that year. There has been no updated study on the matter since, but it is reasonable to expect that trade volume that passes through the South China Sea could have only grown over the past five years. All major economies have stakes in ensuring the safe passage of shipping through the seas of the Indo-Pacific and any interruption would have tremendous consequences to the global economy. Some would argue that trade remains uninterrupted despite periodic tensions. While that may be true, acquiescing to a state’s expansive claim not based on international law is akin to giving that state a lever through which to coerce others in the future by applying rules arbitrarily. In essence, not pushing back is shortsighted.

Moreover, while the region’s maritime spaces contain relatively modest proved and probable hydrocarbon reserves—not really sizable enough to reverse East Asia’s reliance on Middle Eastern energy—littoral states in the region are keen to tap them. For countries like

**“Some would argue that trade remained uninterrupted despite periodic tensions. While that may be true, acquiescing to a state’s expansive claim not based on international law is akin to giving that state a lever through which to coerce others in the future...”**

the Philippines and Vietnam, oil and gas resources in their exclusive economic zone and continental shelf are critical for long term energy security. Manila sees resources at the Reed Bank as most viable replacement to its existing Malampaya gas field, currently delivering as much as 20% of the country’s electricity requirements, but is expected to run dry in the coming years.<sup>6</sup> The Reed Bank, while clearly inside the Philippines’ exclusive economic zone (EEZ), is

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<sup>2</sup> Association of Southeast Asian Nations, “Declaration on the Conduct of Parties in the South China Sea,” October 17, 2012, [https://asean.org/?static\\_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2](https://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2).

<sup>3</sup> The White House, “U.S. – Japan Joint Leaders’ Statement: U.S. – Japan Global Partnership for a New Era,” April 16, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/16/u-s-japan-joint-leaders-statement-u-s-japan-global-partnership-for-a-new-era/>.

<sup>4</sup> United Nations Convention on the Law of the Sea, signed 10 December 1982, (entered into force 16 November 1994) art. 122, [https://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf).

<sup>5</sup> Center for Strategic and International Studies, “How Much Trade Transits the South China Sea?” China Power, August 2, 2017, <https://chinapower.csis.org/much-trade-transits-south-china-sea/>.

<sup>6</sup> Felix Chang, “Running out of Gas: Philippine Energy Security and the South China Sea,” Foreign Policy Research Institute, September 6, 2019, <https://www.fpri.org/article/2019/09/running-out-of-gas-philippine-energy-security-and-the-south-china-sea/>.

also within China's nine-dash lines, and Chinese coercion has prevented oil exploration since 2011. Meanwhile, some media reports in 2019 and 2020 revealed that Hanoi had to pay around a billion dollars to two foreign energy companies for terminating their South China Sea operations, reportedly because of pressure from Beijing.<sup>7</sup> Additionally, the maritime domain provides livelihoods to millions of fishermen. The South China Sea alone accounts for 12% of the world's annual fish catch.

A rules-based order means lawful maritime commerce will continue without interruption, countries will be able to tap new sources of energy critical for their rapidly growing economies, and the livelihoods and well-being of millions of people in coastal communities will be ensured.

Finally, beyond interstate disputes, there are other significant security concerns associated with the waters of the Indo-Pacific. These include piracy and armed robbery against ships, maritime terrorism, illicit narcotics and human trafficking, pollution and environmental degradation, illegal, unreported and unregulated (IUU) fishing, climate change and rising sea-levels, among many others. Some littoral states in Southeast Asia view these challenges as more urgent that should be prioritized. But many of these transnational problems require interstate cooperation based on international law. This is inhibited by the perception that it may involve some loss of sovereignty, or risks of legitimizing the other parties' jurisdictional claims, amidst unsettled maritime and/or territorial disputes. For instance, many states are reluctant to establish joint marine environmental protection areas because such may give way for rival claimants to conduct law enforcement or be present in areas already under their jurisdiction, per the current status quo.

Despite the apparent regional consensus on the benefits of a rules-based maritime order, why do tensions continue to rise and the applicability of international rules and norms to the region's maritime spaces continue to weaken? The seven other authors of this volume have provided numerous answers, but each fall into one of the following key factors—lack of good faith vis-à-vis international law, inherent weaknesses in regional multilateral mechanisms, and the geopolitics surrounding the so-called great power competition.

First, some countries continue to make excessive maritime claims, even those already declared invalid or without basis under international law by a competent and authoritative international tribunal. In other words, there is a lack of good faith, an important international law principle, vis-à-vis adherence to related international legal regimes.<sup>8</sup> In the South China Sea, Beijing continues to insist on its nine-dash lines, a claim outrightly rejected in July 2016 by an arbitration tribunal constituted in The Hague under Annex VII of UNCLOS. China has also been attempting to reverse Japan's administration of the Senkaku Islands, not through peaceful means such as judicial procedures, but by resorting to coercive maneuvers in the East China Sea.

This lack of good faith and blatant disregard for international law can be seen in Beijing's dispatch of

fishing vessels with maritime militia to neighboring states' EEZ that also fall within the discredited nine-dash lines. It has also been using Coast Guard and other government vessels to put into question the longstanding control and jurisdiction of many Indo-Pacific littoral states over their waters, and to initiate a new status quo. Maritime experts call these actions gray zone operations, activities below the threshold of an armed attack, but consequential enough to achieve security or political objectives. Maritime scholar Jonathan Odom described operating in the gray zone in terms of a black to white continuum. "On the spectrum's 'white end,' the mere existence or presence of military forces would not constitute a use of force. On its 'black end,' dropping bombs, launching missiles, or landing combat forces ashore would constitute a use of force."<sup>9</sup> In between the two ends are a wide range of activities characterized as 'gray zone.'

Regional countries have been struggling to respond to these types of activities. For U.S. allies in the region, Washington's security commitment is triggered only by an 'armed attack,' not by gray zone challenges. Hence, deterrence through collective security has been harder to achieve. U.S. treaty-ally the Philippines, for instance, lost Mischief Reef in 1995 and Scarborough Shoal in 2012 because of failure to respond to Beijing's gray zone maneuvers (and arguably enabled by the U.S. alliance system's inability to deter and respond to gray zone strategies). Some in Japan, another U.S. treaty-ally, have expressed concerns about China's intrusions into the contiguous zone and territorial waters of the Senkaku Islands. What to do should Chinese government vessels, which under international law enjoy sovereign immunity, enter the territorial waters of the Senkaku Islands and refuse to leave? The answer to that question may spell the difference between war and peace. For others in the region, dealing with increasing Chinese presence in their waters is even more difficult owing to factors such as insufficient maritime domain awareness and weak offshore law enforcement capacity, among others.

Second, while ASEAN-led institutions remain important to advancing a rules-based maritime order in the Indo-Pacific Region, they are almost by design inherently infirm in addressing high stakes security issues, especially those that involve the great powers. The ASEAN Regional Forum (ARF) has long been a platform for foreign ministry officials to discuss regional challenges and promote confidence-building measures, preventive diplomacy, and cooperation on a range of security issues among its 27 members. Likewise, the ASEAN Defense Ministers Meeting Plus (ADMM+) has engaged ASEAN and eight dialogue partners in closely looking at regional security challenges and pushing for cooperative mechanisms among their armed forces on a variety of issues including maritime security. But the "ASEAN Way" of non-interference and consensus approach to decision-making has constrained the regional mechanisms' effectiveness in dealing with disputes over the South and East China Seas. These regional institutions debate terminologies to use and words to include in their post-meeting statements, and while they trigger discussions on

<sup>7</sup> Bill Hayton, "China's Pressure Costs Vietnam \$1 Billion in the South China Sea," *The Diplomat*, July 22, 2020, <https://thediplomat.com/2020/07/chinas-pressure-costs-vietnam-1-billion-in-the-south-china-sea/>.

<sup>8</sup> D'Amato defines "good faith" – as an obligation by states to "deal honestly and fairly with each other," and "to represent their motives and purposes truthfully, refrain from taking unfair advantage that might result from a literal and unintended interpretation of the agreement between them." For more information, see Anthony D'Amato, "Good Faith", in *Encyclopedia of Public International Law*, ed. Rudolph Bernhardt (Amsterdam: North-Holland: Elsevier, 1992), 599-601.

<sup>9</sup> Jonathan Odom, "China's 'Riskfare,'" *Proceedings*, March 2019, <https://www.usni.org/magazines/proceedings/2019/march/chinas-riskfare>.

some functional cooperative engagements, they have not shaped the strategic environment of the region in ways that strengthen the rule of law. For instance, the so-called South China Sea Code of Conduct has never materialized despite countless meetings and negotiations between ASEAN and China since the idea was introduced in 1995. Moreover, as Kyoko Hatakeyama has discussed extensively in her chapter, the Quad too, has struggled to achieve the united front necessary to prop up maritime rule of law given the four countries' varying threat perceptions, security priorities, and approaches in dealing with China.

Given these weaknesses in multilateral security mechanisms, many in the region value U.S. leadership and seek a clear strategy. The Biden Administration's promised multilateralist approach to foreign policy has been widely welcomed in the region. It is time for the United States to deliver on that promise and lead in strengthening regional institutions to better advance a rules-based maritime order.

Finally, the framing of maritime issues in the region as part of the so-called U.S.-China 'strategic rivalry' or

'competition' has not been helpful in fostering a rules-based maritime order. For one, many in the region do not want to take part in that

competition. But most importantly, the framing of the increasingly tense security environment in maritime Asia as a by-product of 'great power competition' results in two unfavorable and inaccurate narratives that prevent regional states from taking stronger positions based on international law: 1) false equivalence, which equates U.S. legitimate maritime operations and presence in the region as akin to China's disruptive, illegal, and domineering behavior; and 2) Washington and Beijing are both implicitly forcing Southeast Asians to make a choice—hence the prevalence of the "do-not-make-us-choose" refrain from political leaders and key decisionmakers in the region. At times, when the United States or its allies and partners insist on adherence to international law, some in the region take that as anti-China. This obscures the real choice, which is between a rules-based maritime order and a power-based maritime order. The former is based on the primacy of international law. The latter is based on might and would result in an arbitrarily governed Indo-Pacific. Instead of 'competition with China,' the United States and its allies and partners are better served with a narrative that focuses on advancing a rules-based maritime order, in which countries, big and small, can benefit.

This volume, of which six of the eight chapters were authored by women, dissects the multifaceted maritime challenges in the Indo-Pacific from multiple perspectives, and explores policy options through which to advance a more rules-based maritime order. Shuxian Luo surveys six major maritime crises between Japan and China over the Senkaku/Diaoyu Islands and between Japan and the Republic of Korea over Dokdo/Takeshima,

and argues that crisis prevention should be prioritized because "maritime disputes in Northeast Asia are often intertwined with other thorny issues such as wartime history, nationalism, and domestic politics, making prompt de-escalation difficult to pursue once a crisis occurs." Luo recommends pre-empting future crisis-triggering activities by subnational and nonstate actors through crisis prevention mechanisms at both the interstate and intrastate levels.

Ishii Yurika's paper explains how the unique structure of Japan's national security law has created security challenges by hampering seamless coordination between Japan Coast Guard (JCG) and Japan Maritime Self-Defense Force (JMSDF), and effective alliance between Japan and the United States. Those challenges have become evident in the territorial sea of the Senkaku Islands, where vessels of JCG and China Coast Guard (CCG) confront each other almost daily. Kanehara Atsuko's chapter characterizes the "rule of law" in the context of maritime security as consisting of three principles: making and clarifying claims based on international law, not using force or coercion in trying to

drive claims, and seeking to settle disputes by peaceful means. She posits these principles have formed as the main pillars of Japanese maritime diplomacy and ocean policy.

Nguyen highlights the importance of adherence to international law vis-à-vis the use of force at sea. Her paper assesses China's new Coast Guard law and its conformity with international law. Hatakeyama Kyoko focuses on the Quad by analyzing the interests of each member state. She argues that the varying views and interests of Quad states hinder the group's evolution. In addition, Hatakeyama brings up a new argument: the Quad's embrace of two contradictory goals—to maintain a rules-based order based on international law and to promote a prosperous region which could not possibly exclude China—makes it difficult to develop a framework for cooperation and set a clear purpose.

Virginia Watson proposes several recommendations based on how "the hub-and-spokes system in Asia have lost their edge, struggling to adapt in a security environment marked by a different set of strategic conditions." Watson argues that the "intensification of China's global efforts to hard-wire geopolitical and security conditions alongside its hefty economic influence" have made the traditional alliance approach of the United States ineffective. Finally, John Bradford argues that the key to addressing the Indo-Pacific's multifaceted challenges is improved governance capacity among the region's coastal states. Bradford proposes that the U.S.-Japan Alliance develop and implement a strategy to address the full range of Indo-Pacific maritime challenges more holistically but with a practical focus on Southeast Asia. More specifically he argues that maritime governance capacity-building be a major U.S.-Japan Alliance agenda.



# Strengthening Maritime Crisis Prevention in Northeast Asia: A Focus on Subnational and Nonstate Actors

Shuxian Luo<sup>1</sup>

## Introduction

While analyses of interstate crises have traditionally focused on crisis management and state-level factors such as signaling and bargaining between rivaling parties, this state-centric approach leaves an important question understudied: how shall we handle interstate crises with subnational and nonstate actors involved? This question is crucial to managing contemporary interstate relations in Northeast Asia for two reasons. First, subnational and nonstate actors have played a major role in triggering crises related to maritime territorial and boundary disputes in this region.<sup>2</sup> Second and relatedly, the issue of how to *prevent* maritime crises from occurring in the first place remains inadequately addressed.

By surveying six major maritime crises arising from the Japan-China dispute over the sovereignty of the Diaoyu/Senkaku Islands and the Japan-Republic of Korea (ROK) dispute over the ownership of Takeshima/Dokdo,<sup>3</sup> this article argues that crisis prevention should be prioritized because maritime disputes in Northeast Asia are often intertwined with other thorny issues such as wartime history, nationalism, and domestic politics, making prompt deescalation difficult to pursue once a crisis occurs. This study recommends a two-level crisis prevention mechanism comprised of *interstate* and *intrastate* measures to prevent and deter crisis-triggering actions by subnational and nonstate actors.

## Crisis prevention with a focus on substate and nonstate actors

Subnational actors entail various levels of local governments. These actors usually enjoy some autonomy in adopting policies in their regions and are held accountable to local interests to some degree. In addition to local governments, this study also includes local commanders in a state's maritime security apparatus, whose "excessive zeal or incompetence" may bear responsibility for triggering incidents at sea, as substate actors.<sup>4</sup> Crisis-triggering actions taken by subnational actors include but are not limited to adopting local legislation and administrative measures governing disputed areas; conducting locally backed surveys, patrols, and construction in disputed areas; and initiating

domestic civilian proceedings to lease, purchase or develop contested territory.

Nonstate actors entail nongovernmental advocacy groups, research institutions, private businesses, and individual citizens. Crisis-triggering actions taken by nonstate actors may include, but are not limited to, confronting actors of a rivaling party in the contested areas, sailing to and constructing in the disputed areas, and initiating domestic civilian proceedings.

The maritime security environment in Northeast Asia has been crisis-prone over the past two decades as a variety of subnational, nonstate, and state actors have all become increasingly involved in maritime disputes. Not all actors receive the same level of state endorsement. State-level actors such as navies and coast guards are often brought to the contested maritime space by state authorities to assert claims, while activists may be permitted by state authorities on a selective basis to come to the forefront of the disputes to demonstrate popular

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support or pressure for a firm posture. Still others, for example, local governments, may take autonomous actions, sometimes even against the will of state authorities. While the process of crisis management remains highly centralized to preserve diplomatic latitude and curtail the unwanted influence of "noises," subnational and nonstate actors can play and have played a significant role in triggering crises.

In the event of a maritime crisis, two powerful dynamics are often at play, making a quick deescalation politically difficult for decisionmakers. The first dynamic is akin to what Thomas Schelling calls "interdependence of commitments," meaning that when there are multiple contentious issues between the rivaling states, either or both parties may be tempted to act tough on one issue to signal resolve on others.<sup>5</sup> China and South Korea view the Diaoyu/Senkaku Islands and Takeshima/Dokdo disputes,

<sup>1</sup> Shuxian Luo is incoming post-doctoral research fellow in foreign policy at Brookings Institution. Her research examines China's crisis behavior and decision-making processes, maritime security in the Indo-Pacific, U.S. relations with Asia, and Asia-Arctic policy. Dr. Luo received her Ph.D. in International Relations from Johns Hopkins University School of Advanced International Studies (SAIS). She holds an M.A. in China Studies and International Economics from SAIS, an M.A. in Political Science from Columbia University, and a B.A. in English from Peking University. The author thanks Rachel Esplin Odell for her comments on an earlier draft.

<sup>2</sup> While this study focuses on the spoiler role of subnational and nonstate actors, civil actors can play and have played a constructive role in interstate crises. See, for example, Rachel Esplin Odell, "How Nongovernmental Actors Can Improve Crisis Management in U.S.-China Relations," in *Finding Firmer Ground: The Role of Civil Society and NGOs in U.S.-China Relations*, the Carter Center, Feb. 2021, <https://us-china.report/>, 47-64.

<sup>3</sup> The Republic of China (ROC) on Taiwan also claims the sovereignty of the Diaoyu/Senkakus.

<sup>4</sup> Sean M. Lynn-Jones, "Incident at Sea Agreement," in Alexander L. George, Philip J. Farley, and Alexander Dallin, ed., *U.S.-Soviet Security Cooperation: Achievements, Failures, Lessons* (New York: Oxford University Press, 1988), 484.

<sup>5</sup> Thomas C. Schelling, *Arms and Influence* (New Haven and London: Yale University Press, 1966), 55.

respectively, as part of Japan's imperial legacy.<sup>6</sup> These disputes are therefore closely intertwined with emotionally charged historical controversies that trouble Japan's regional relations. In the event of a maritime crisis, decisionmakers may be locked into a rigid position that precludes the compartmentalization of the crisis from other bilateral issues.

The second dynamic is cross-case reinforcement where states often watch not only what their adversary does but also what the adversary's adversary does. This dynamic is quite noticeable in Northeast Asia's maritime disputes. Both in 2005 and 2012, hardliners in China applauded South Korea's forceful reactions to the Takeshima/Dokdo dispute and pressed for a firmer Chinese posture in its handling of disputes with Japan.

A major implication of these two crisis dynamics is that even seemingly minor frictions can be highly combustible. The risk of incidents at sea and unpredictable escalation is further heightened as claimants now adopt an increasingly permissive approach toward the use of lethal force when dealing with each other in contested areas.<sup>7</sup> All these circumstances underscore the imperative need to prioritize crisis prevention.

### Past maritime crises in Northeast Asia

This section surveys six major crises arising from the Diaoyu/Senkaku Islands and the Takeshima/Dokdo disputes in the past two decades, with a focus on the spoiler role of substate and nonstate actors.

#### 2004 Chinese landing on the Diaoyu/Senkaku

Until the early 2000s, Beijing had persistently suppressed Diaoyu/Senkaku-related activism in mainland China.<sup>8</sup> This policy began to unravel as the Sino-Japanese relationship became strained after Prime Minister Koizumi Junichirō took office in 2001 and started paying annual visits to the controversial Yasukuni shrine.<sup>9</sup> Against this backdrop, the Diaoyu/Senkaku dispute became a front-burner issue in 2003 after it was revealed that the Government of Japan (GOJ) had leased one of the five Diaoyu/Senkaku Islands since 1972 and three more

since 2002. Although Tokyo rationalized the lease as a preventive measure intended to block third-party purchase of or illegal landing on the islands, Beijing believed the move was intended to bolster Japan's claims.<sup>10</sup> Starting from mid-2003, China quietly lifted restrictions on protest voyages to the Diaoyu/Senkaku Islands. On March 24, 2004, seven Chinese activists completed the first successful landing by mainland China-originating activists on the Diaoyu/Senkaku Islands. Japan Coast Guard (JCG) detained the activists. It was the first time that Japanese authorities had arrested Chinese nationals for landing on the islands.<sup>11</sup>

This landing touched off a diplomatic crisis as central governments on both sides became involved with protests and canceled bilateral events.<sup>12</sup> Meanwhile, as Chinese popular perception of Japan rapidly deteriorated amid a slew of high-salience bilateral incidents at the time, anti-Japan protests erupted in Beijing.<sup>13</sup> Tensions were not defused until March 26, 2004, when Japan announced it would immediately deport the Chinese activists. Koizumi seemed to have leveraged his political clout to prevent the relationship from being derailed further, as he signaled his intention to curb the ramifications of this crisis on March 25 by stating that he would like to see the incident be "handled in such a way that it will not stymie the overall Japan-China relations."<sup>14</sup>

Japan has since come to see island defense as one of its top military priorities.<sup>15</sup> In November 2004, it was revealed that the Japanese Defense Agency had developed a plan on how to respond to three types of contingencies involving China, one of which was a hypothetical military conflict over the Diaoyu/Senkaku Islands.<sup>16</sup> The National Defense Program Guidelines (NDPG) released in December 2004 specified for the first time that the GOJ saw China's expanding military capabilities as a potential security threat.<sup>17</sup>

During this crisis, the United States also became involved, as the prospect of a major change in China's policy on the Diaoyu/Senkaku dispute opened fertile ground for Japan to push Washington for a clear reaffirmation of U.S. treaty obligations regarding the islands.<sup>18</sup> On March 24, 2004, Washington gave its first official, explicit reiteration that the U.S.-Japan security

<sup>6</sup> State Council Information Office of the PRC, "Diaoyu Dao, an Inherent Territory of China," Sept. 2012, [http://english.gov.cn/archive/white\\_paper/2014/08/23/content\\_281474983043212.htm](http://english.gov.cn/archive/white_paper/2014/08/23/content_281474983043212.htm); Ministry of Foreign Affairs of the ROK, "Q&A on Dokdo," <https://dokdo.mofa.go.kr/eng/dokdo/faq.jsp>.

<sup>7</sup> Yew Lun Tian, "China authorizes coast guard to fire on foreign vessels if needed," Reuters, Jan. 22, 2021, <https://www.reuters.com/article/us-china-coastguard-law/china-authorizes-coast-guard-to-fire-on-foreign-vessels-if-needed-idUSKBN29R1ER>; "Japan can shoot at foreign government vessels attempting to land on Senkakus, LDP official says," *Japan Times*, Feb. 2, 2021, <https://www.japantimes.co.jp/news/2021/02/25/national/senkakus-east-china-sea-japan-coast-guard-defense/>.

<sup>8</sup> Beijing and Tokyo agreed to put the Diaoyu/Senkaku dispute on a back burner when the two countries negotiated a peace and friendship treaty in the 1970s and improved bilateral especially economic ties in the 1980s. Throughout the 1990s, the top priority for Beijing was to break out of the post-1989 international isolation, to which Japan was the most sympathetic G7 member. Jessica Chen Weiss, *Powerful Patriots: Nationalist Protest in China's Foreign Relations* (London: Oxford University Press, 2014), 86-126. On the other hand, activists from Japan, Taiwan and Hong Kong have since the 1970s attempted to sail to the Diaoyu/Senkaku to assert Chinese sovereignty over the islets.

<sup>9</sup> Ming Wan, *Sino-Japanese Relations: Interaction, Logic, and Transformation* (Washington DC: Woodrow Wilson Center Press, 2006), 235-261.

<sup>10</sup> Mari Yamaguchi, "Japan defends move to rent disputed islands after criticism from China and Taiwan," Associated Press, Jan. 3, 2003; "China steps up protest over disputed Senkaku Islands," *Japan Economic Newswire*, Jan. 5, 2003.

<sup>11</sup> Before this landing, several unsuccessful attempts to sail to the islands were made between June 2003 and January 2004. Japan Coast Guard *Japan Coast Guard Annual Report 2004* [海上保安レポート 2004], <https://www.kaiho.mlit.go.jp/info/books/report2004/honpen/hp02010700.html>; Weiss, *Powerful Patriots*, 129.

<sup>12</sup> James J. Przystup, "Japan-China Relations: Not Quite All about Sovereignty – But Close," *Comparative Connections*, vol. 6, issue 2, July 2004.

<sup>13</sup> In addition to the Yasukuni and territorial issues, several other incidents intensified the worsening of Chinese popular perception of Japan. In August 2003, 36 Chinese workers were infected by chemical weapons abandoned by the Japanese Imperial Army in Heilongjiang. In September, a group of some 400 Japanese tourists was reported to have engaged Chinese prostitutes in Guangdong. In October, a risqué skit by three Japanese students and one of their teachers in Shaan Xi provoked massive anti-Japanese demonstrations by local students. For a detailed account, see Peter Gries, "China's 'New Thinking' on Japan," *The China Quarterly*, vol. 184, Dec. 2005, 831-850 and "Japan to ask China to prevent recurrence of flag burning," *Japan Economic Newswire*, Mar. 26, 2004.

<sup>14</sup> "Japan downplays fallout from isle dispute on ties with China," *Japan Economic Newswire*, Mar. 25, 2004.

<sup>15</sup> Sheila Smith, *Japan Rearmed: The Politics of Military Power* (Cambridge, MA: Harvard University Press, 2019), 118.

<sup>16</sup> "Japan Defense Agency set 3 scenarios of China attack," *Japan Economic Newswire*, Nov. 7, 2004.

<sup>17</sup> Defense Agency of Japan, "National Defense Program Guideline, FY 2005-," Dec. 10, 2004, 2-3.

<sup>18</sup> Author's phone interview, August 2019. On traditional U.S. reluctance to reaffirm the application of Article 5 to Diaoyu/Senkaku contingencies, see, Michael Green, *Japan's Reluctant Realism: Foreign Policy Challenges in an Era of Uncertainty Power* (New York: Palgrave, 2001), 86-87.

treaty covers the Diaoyu/Senkaku Islands, marking a reduction in its policy ambiguity.<sup>19</sup>

### 2005 Takeshima Day ordinance

The Takeshima/Dokdo islets located in the Sea of Japan have been under South Korea's control since 1952. After normalizing their diplomatic ties in 1965, Japan and South Korea tacitly shelved the sovereignty dispute in the broader context of the Cold War.<sup>20</sup> The issue, however, was kept alive in each of the two countries' domestic politics. In Japan, the Shimane Prefecture, which had administrative authority over the Takeshima/Dokdo since 1905 until the end of World War II, advocates for a stronger Japanese posture on the dispute.<sup>21</sup> In South Korea, a campaign to "protect Dokdo" emerged in the 1980s although it had remained largely a grassroots movement until 2005.<sup>22</sup>

In 2004, South Korea decided to issue a Dokdo memorial stamp. Shimane requested the GOJ respond by designating a national Takeshima Day, an idea rejected by the Ministry of Foreign Affairs (MOFA) and the ruling Liberal Democratic Party's (LDP) leadership.<sup>23</sup> Then, in March 2005, Shimane passed an ordinance to designate February 22 as Takeshima Day to celebrate the 100<sup>th</sup> anniversary of the incorporation of the islets into the prefecture. Shimane's campaign was driven by local economic and political interests in the Takeshima and was enabled by Japan's moves towards decentralizing its governance system in the 1990s and 2000s.<sup>24</sup>

As with Sino-Japanese relations, the Japan-ROK relationship is plagued with historical controversies. The Takeshima Day ordinance came at a time when the relationship was deteriorating over Koizumi's Yasukuni visits and the GOJ's approval of a new history textbook that South Korea (and China) saw as whitewashing Japan's wartime atrocities. The Korean public reacted fiercely to the ordinance. Radical anti-Japan protests erupted throughout South Korea. In response to the popular pressure, the Roh My-hyun government lifted restrictions on public access to Takeshima/Dokdo that had been imposed since 1982 and ended Seoul's traditional policy of "quiet diplomacy" in managing this dispute.<sup>25</sup>

## **"As with Sino-Japanese relations, the Japan-ROK relationship is plagued with historical controversies."**

Tensions over the islets further escalated in 2006, bringing America's two key allies to the brink of a naval skirmish. In April, in response to South Korea's plan to rename the "Sea of Japan" to "East Sea," Japan dispatched two Japan Coast Guard (JCG) vessels to survey the Takeshima/Dokdo waters. Seoul responded by deploying over 20 patrol boats to the area, warning of a "possibility of physical clash" should Japan press on. A tense standoff ensued. The crisis lasted four days until Tokyo withdrew its ships and Seoul suspended its renaming plan.<sup>26</sup>

The crisis also had a repercussion in the context of Sino-Japanese relations, as Tokyo and Beijing were at that time, locked horns over a range of contentious issues including a dispute over hydrocarbon resources in the undelimited areas of the East China Sea.<sup>27</sup> China's media ran extensive coverage on the Takeshima/Dokdo dispute with hawks applauding South Korea's strong reaction and urging Beijing to follow suit. Sun Zhihui, then head of China's State Oceanic Administration (SOA), praised South Korea's action as a firm defense of territory and stated that China should learn from its small neighbor.<sup>28</sup> Likely pressured or emboldened by Seoul's tough posture, Beijing unleashed nationwide anti-Japan protests in April 2005 and, in September, deployed a flotilla of five naval ships to exercise near the contested East China Sea natural gas fields.

### 2008 PRC patrol in the Diaoyu/Senkaku territorial sea

Before the China Coast Guard was established in 2013, China Marine Surveillance (CMS) was one of China's maritime law enforcement agencies responsible for monitoring China's near seas. The CMS received Beijing's permission in mid-2006 to regularize its patrols in China's claimed sea areas, but the Diaoyu/Senkaku territorial sea remained off-limits. Requests to patrol the Diaoyu/Senkaku territorial sea had to be approved by the CMS headquarters, the SOA (which oversaw the CMS), and the Chinese Ministry of Foreign Affairs (MFA). As of August 2008, no such request had been approved, as China and Japan moved to mend fences following Koizumi's departure in the fall of 2006. Moreover, China did not want

<sup>19</sup> Prior to the reaffirmation, the strongest statement from the Bush administration was made by then Deputy Secretary of State Richard Armitage in February 2004. Armitage stated that the treaty "would require any attack on Japan, or the administrative territories under Japanese control, to be seen as an attack on the United States" without an explicit reference to the Diaoyu/Senkaku Islands. U.S. State Department Press Briefing Transcript, Mar. 24, 2004, <https://2001-2009.state.gov/r/pa/prs/dpb/2004/30743.htm>; U.S. State Department, "Remarks and Q&A at the Japan National Press Club, Richard L. Armitage, Deputy Secretary of State, Tokyo, Japan," Feb. 2, 2004, <https://2001-2009.state.gov/s/d/former/armitage/remarks/28699.htm>.

<sup>20</sup> Victor Cha, "Bridging the Gap: The Strategic Context of the 1965 Korea-Japan Normalization Treaty," *Korean Studies*, Vol. 20, 1996, 158, endnote 104; Alexander Bukh, "Japan's territorial-disputes policy: Success or failure?" in Mary M. McCarthy, ed., *Routledge Handbook of Japanese Foreign Policy* (London: Routledge, 2018), 194-195.

<sup>21</sup> For a detailed account of Shimane's Takeshima campaign in the postwar era, see, Alexander Bukh, *The Islands Are Ours: The Social Construction of Territorial Disputes in Northeast Asia* (Stanford, CA: Stanford University Press, 2020), 58-76.

<sup>22</sup> *ibid.*, 96-111.

<sup>23</sup> *ibid.*, 81-82.

<sup>24</sup> Shimane Prefecture/Shimane Prefecture Board of Education, "Takeshima Informational Leaflet," <https://www.pref.shimane.lg.jp/admin/pref/takeshima/web-takeshima/takeshima06/pamphlet/index.data/takeshima-leaflet-eigo.pdf>; Purnendra Jain, "Japan's Subnational Government: Toward Greater Decentralization and Participatory Democracy," in Takashi Inoguchi and Purnendra Jain, ed., *Japanese Politics Today: From Karaoke to Kabuki Democracy* (New York, NY: Palgrave Macmillan, 2011), 163-181; Bukh, *The Islands Are Ours*, 82-86.

<sup>25</sup> "South Korean demonstrators cut off fingers to protest Japan's claim to islets," Associated Press, Mar. 14, 2005; Soo-jeong Lee, "South Korea to open islets to citizens in angry response to Japanese vote," Associated Press, Mar. 16, 2005; Gyeongsangbuk-do Province, "Everything You Need to Know About Dokdo," Dec. 31, 2015, 10; Krista E. Wiegand, "The South Korean-Japanese security relationship and the Dokdo/Takeshima islets dispute," *The Pacific Review*, Vol. 28, Issue 3, 2015, 347-366.

<sup>26</sup> Kwang-tae Kim, "South Korea warns of possible clash with Japan as talks continue on disputed islets," Associated Press, Apr. 20, 2006; Jae-soon Chang, "Japan, South Korea defuse tense standoff over disputed waters," Associated Press, Apr. 22, 2006.

<sup>27</sup> Other contentious issues in Sino-Japanese relations at the time included Japan's history textbook, Koizumi's Yasukuni visits, and Japan's bid for a permanent seat on the UN Security Council.

<sup>28</sup> "Director of the State Oceanic Administration: China has the determination to confront Japan" [国家海洋局长：中国有决心抗日], China Review News [中國評論新聞網], Apr. 29, 2006, <http://cn1.crntt.com/crn-webapp/doc/docDetailCreate.jsp?coluid=9&kindid=550&docid=100133784&mdate=0911123624>.

to tarnish the political climate before the Beijing Olympics.<sup>29</sup> However, the CMS, especially its East China Sea division, saw such patrols as long overdue and quietly planned to conduct one by the end of 2008.<sup>30</sup> The patrol was scheduled for December 8, a Monday when JCG vessels in the area would turn over shifts, enabling CMS to take advantage of the time gap between vessels being on station.<sup>31</sup> The division notified the CMS headquarters of its plan but skipped the SOA and the MFA.<sup>32</sup>

On December 8, 2008, two CMS ships sailed within the Diaoyu/Senkaku territorial sea for nine hours, marking the first Chinese patrol of these highly sensitive waters.<sup>33</sup> Four days later, Japan's Prime Minister Aso Taro and Chinese Premier Wen Jiabao clashed over the patrol during their meeting in Fukuoka.<sup>34</sup> Wen was caught off guard when Aso raised the patrol, and could merely respond by reiterating China's official position.<sup>35</sup> The diplomats accompanying Wen were similarly unprepared and scrambled to find out information about the patrol.<sup>36</sup> After the meeting, the MFA took the issue to China's top leader Hu Jintao. Hu's response was to "prioritize maintaining stability,"<sup>37</sup> which in effect suspended Chinese patrols in Diaoyu/Senkaku territorial waters until August 2011.<sup>38</sup>

This incident had long-term implications. Viewing the patrol as indicative of Chinese irredentist intentions concerning the Diaoyu/Senkaku dispute,<sup>39</sup> Japan began to actively seek an explicit reaffirmation from the newly inaugurated Obama administration on U.S. treaty obligations in the event of a Diaoyu/Senkaku contingency.<sup>40</sup> This incident also contributed to Japan's rigid handling of the 2010 fishing trawler collision, which Tokyo believed China was using to further change the status quo.<sup>41</sup>

### 2010 Fishing trawler collision

The 2010 fishing trawler collision is a prime case of how private citizens' impulsive behavior in contested waters can trigger a major crisis between Japan and China that eventually dragged in the United States. On September 7, 2010, a Chinese fishing boat was involved in multiple collisions with two JCG patrol ships in the Diaoyu/Senkaku territorial waters. The JCG detained the Chinese crew members, including the captain who was believed to be under the influence of alcohol at the time.<sup>42</sup>

The GOJ's insistence on prosecuting the Chinese skipper under Japan's domestic law became the focus of the crisis, as Beijing believed that Japan was attempting to set a legal precedent that would be negatively biased toward China's sovereignty claims.

This incident was particularly ill-timed. It occurred ten days before September 18, the 79<sup>th</sup> anniversary of the Mukden Incident that marked Japan's invasion of Manchuria. Nationalist emotions often run high in China in the days leading up to WWII-related anniversaries. China had also just emerged from the global financial crisis and replaced Japan as the world's second-largest economy. Boosted confidence, combined with the still strong mentality of victimization, meant that domestic backlash could be even stronger than in the past should Beijing appear weak in dealing with Japan. Thus, Beijing launched an unusually forceful, multi-pronged escalation, suspending all high-level bilateral exchanges, deploying government vessels to patrol the Diaoyu/Senkaku waters (excluding the territorial sea), imposing an unofficial rare earth embargo, and detaining four Japanese nationals accused of trespassing into a military zone in China.

With neither China nor Japan showing any willingness to deescalate, Washington decided to step in. According to a firsthand account, Washington's basic proposal was for Japan to release the captain on humanitarian grounds as a face-saving way of deescalation. During her meeting with Japan's foreign minister Maehara Seiji in New York on September 23, U.S. Secretary of State Hillary Clinton pressed for a resolution along this line and was told by Maehara that Japan would find a way to deescalate.<sup>43</sup> Application of U.S.-Japan Security Treaty's Article 5 to the Diaoyu/Senkaku was reaffirmed as a *quid pro quo* during the meeting. After the meeting, Maehara announced that Clinton confirmed to him that the Diaoyu/Senkaku Islands were covered by the security treaty.<sup>44</sup> This outcome was intended as a "two-way solution" in that "the Chinese got the captain and the Japanese got Article 5."<sup>45</sup> In this incident, Washington was, in a sense, dragged in, considering the information surfacing prior to the collision that the Obama administration had been reluctant to openly reiterate the treaty's application to the Diaoyu/Senkaku Islands.<sup>46</sup>

Although China scored an immediate diplomatic victory with the release of the captain, the

<sup>29</sup> Author's interviews, Tokyo, August 2018, Beijing, March 2019, Shanghai, April 2019.

<sup>30</sup> Author's interviews, Tokyo, August 2018, Shanghai, April 2019.

<sup>31</sup> Xie Tao [谢韬], "Details of China's patrol of the Diaoyu Island: the Japanese side attempted to ram CMS ships" [中国巡航钓鱼岛细节: 日方企图碰撞中国海监船], *International Herald Leader* [国际先驱导报], Dec. 12, 2008, [http://news.ifeng.com/mil/2/200812/1212\\_340\\_919318.shtml](http://news.ifeng.com/mil/2/200812/1212_340_919318.shtml).

<sup>32</sup> Author's interview, Shanghai, April 2019.

<sup>33</sup> "Chinese Survey Ships Enter Japanese Waters," *Jiji Press*, Dec. 8, 2008.

<sup>34</sup> "Aso, Wen Clash over Disputed Islands," *Jiji Press*, Dec. 13, 2008.

<sup>35</sup> Author's interviews, Beijing, August 2017, Tokyo, August 2018, Beijing, March 2019; "Wen Jiabao meets with Aso Taro and elaborates on China's position: 'Prevent the Diaoyu Island issue from poisoning the broad Sino-Japanese relations'" [温家宝会见麻生太郎阐述中方立场: "防钓鱼岛问题影响中日关系大局"], *People.com*, Dec. 13, 2008, <http://military.people.com.cn/GB/1076/52984/8515029.html>.

<sup>36</sup> Author's interviews, Beijing, August 2017, Beijing, March 2019.

<sup>37</sup> Author's interviews, Beijing, June 2017, Shanghai, April 2019.

<sup>38</sup> Japan Coast Guard, *Japan Coast Guard Annual Report 2017* [海上保安レポート 2017], [https://www.kaiho.mlit.go.jp/info/books/report2017/html/tokushu/toku17\\_01-1.html](https://www.kaiho.mlit.go.jp/info/books/report2017/html/tokushu/toku17_01-1.html).

<sup>39</sup> Author's interview, Tokyo, August 2018.

<sup>40</sup> James J. Przystup, "Japan-China Relations: New Year, Old Problems," *Comparative Connections*, vol. 11, issue 1, April 2009.

<sup>41</sup> Author's interview, Beijing, August 2017.

<sup>42</sup> Sheila A. Smith, *Intimate Rivals: Japanese Domestic Politics and A Rising China* (New York, NY: Columbia University Press, 2015), p. 190.

<sup>43</sup> Author's interview, Los Angeles, August 2019. The captain's grandmother passed away during his detention on September 8. "Detained Chinese captain's grandmother passed away, the family hoped '[Zhan] would return to see her off'" [中国被扣船长祖母去世, 家属望"回来送老人一程"], *Chinanews*, Sept. 9, 2010, <http://www.chinanews.com/gn/2010/09-09/2523619.shtml>.

<sup>44</sup> "Clinton tells Maehara Senkaku subject to Japan-U.S. security pact," *Japan Economic Newswire*, Sept. 23, 2010.

<sup>45</sup> Author's interview, Los Angeles, August 2019.

<sup>46</sup> Michael Auslin, "China's Military and Security Activities Abroad," hearing before the U.S.-China Economic and Security Review Commission, Mar. 4, 2009, <https://www.uscc.gov/sites/default/files/transcripts/3.4.09HearingTranscript.pdf>; "US not to state security pact with Japan covers Senkaku Islands," *Japan Economic News*, Aug. 16, 2010.



consequences of the incident played against China's long-term security interests. First, in October 2010 when meeting with Maehara in Honolulu, Secretary Clinton publicly and explicitly reaffirmed the coverage of the Diaoyu/Senkaku Islands under the U.S.-Japan Security Treaty.<sup>47</sup> This position has since been enshrined in Washington's Japan policy. This development came as a major diplomatic setback for Beijing.<sup>48</sup> Furthermore, this incident served as a thrust for Tokyo and Washington to reconsolidate the alliance that became strained under the Hatoyama government (September 2009-June 2010). Second, China's escalation galvanized regional concerns that Beijing had become more willing to leverage its growing power to pressure its neighbors in maritime disputes, bringing claimants in the South China Sea closer to Japan.<sup>49</sup> Third, the incident hardened Japan's perception of China as a growing security threat, provided the GOJ with impetus to enhance the Self-Defense Force's capabilities in Japan's southwestern region.<sup>50</sup> Fourth, the incident sparked a wave of "Senkaku nationalism" in Japan's domestic politics.<sup>51</sup> Japan's local authorities, especially Ishigaki city that administers the Diaoyu/Senkaku Islands, became highly active in this nationalistic outcry.<sup>52</sup> The "Senkaku nationalism" eventually culminated in the 2012 nationalization crisis, which was touched off in April when Ishihara Shintaro, then Governor of Tokyo, announced his plan to purchase the Diaoyu/Senkaku islands.<sup>53</sup>

The collision and its follow-on events underscored the unpleasant fact that even with the crisis management arrangements already established between China and Japan, such mechanisms are completely dysfunctional if neither party has the political will to utilize them. A hotline between the two countries' leaders, which was activated in 2000 and relaunched in 2010 just three months before the collision, was unused throughout the crisis.<sup>54</sup>

### 2012 Takeshima/Dokdo landing

Japan-ROK relations deteriorated again in 2012 over Takeshima/Dokdo. While controversies emerged in March after Tokyo approved new textbooks that claimed the islets were Japanese territories,<sup>55</sup> tensions were under

control until late June when a Japanese activist put up a poster next to a Korean comfort woman statue in front of the Japanese embassy in Seoul asserting that Takeshima/Dokdo belonged to Japan.<sup>56</sup> This move touched simultaneously on two sensitive issues, arousing the Korean public's resentment.

The first and most important casualty was an agreement that Tokyo and Seoul were about to sign to allow bilateral intelligence sharing. Under pressure from civic groups and opposition parties, Seoul announced that it would postpone signing the pact.<sup>57</sup> Tensions peaked in August 2012 when South Korean President Lee Myung-bak visited Takeshima/Dokdo, the first such visit by a ROK President. Japan responded by recalling its ambassador to Seoul. The Japanese Lower House then passed a resolution condemning Lee's visit.<sup>58</sup>

With an official position of neutrality on the territorial dispute, the United States was caught between its two allies.<sup>59</sup> The aborted signing of the Japan-ROK intelligence-sharing pact came as a setback for Washington when it had hoped for closer military cooperation between its Asian allies in the face of growing Chinese power and continued North Korean security threats. In September 2012, Washington weighed in to reduce tensions.<sup>60</sup>

The Takeshima/Dokdo controversies, like the 2005 episode, generated cross-case reinforcing effects as tensions between China and Japan were surging surrounding the Diaoyu/Senkaku nationalization. The Chinese public applauded Lee's visit to Takeshima/Dokdo, raising the expectation and pressure that Beijing should act similarly.<sup>61</sup>

### 2012 Diaoyu/Senkaku nationalization

Japan's 2012 nationalization of Diaoyu/Senkaku Islands triggered the most serious crisis between Japan and China since the two countries normalized their relations in 1972. Tokyo Governor Ishihara, while criticizing the GOJ's ineptitude to defend Japan's territories against China, announced that the Tokyo Metropolitan Government would purchase the three privately-owned islets of the Diaoyu/Senkaku Islands.<sup>62</sup> Under pressure from the Japanese public who joined

<sup>47</sup> Remarks by Secretary Clinton: Joint Press Availability with Japanese Foreign Minister Seiji Maehara, Honolulu, Oct. 27, 2010, transcript retrieved at <https://2009-2017.state.gov/secretary/20092013clinton/rm/2010/10/150110.htm>.

<sup>48</sup> "MFA spokesperson Ma Zhaoxu answers media questions, Oct. 28" [10月28日外交部发言人马朝旭答记者问], transcript retrieved at SCIO, <http://www.scio.gov.cn/xwfbh/gbwxwfbh/xwfbh/wjb/document/793923/793923.htm>.

<sup>49</sup> "Statement of President Aquino during the 13th ASEAN-China Summit," Hanoi, Vietnam, Oct. 29, 2010, <https://www.officialgazette.gov.ph/2010/10/29/statement-of-president-aquino-during-the-13th-asean-china-summit/>.

<sup>50</sup> Ministry of Defense of Japan, "The National Defense Program Guidelines for FY 2011 and beyond," Dec. 17, 2010, [https://www.mod.go.jp/e/d\\_act/d\\_policy/national.html](https://www.mod.go.jp/e/d_act/d_policy/national.html).

<sup>51</sup> "Japan nationalists rally against center-left PM, China," Agence France Presse, Oct. 2, 2010; "Over 1,000 Japan nationalists protests China 'invasion,'" Agence France Presse, Oct. 16, 2010; "Anti-China rally held in Japan after video leak of collision," Agence France Presse, Nov. 6, 2010; Eric Talmadge, "Thousands stage anti-China protest in Japan," Associated Press, Nov. 14, 2010.

<sup>52</sup> "Ishigaki Mayor, Assembly Members Eager to Visit Disputed Isles," Jiji Press, Oct. 20, 2010; "City assembly passed ordinance for Senkaku Memorial Day," *Japan Economic Newswire*, Dec. 17, 2010; "Ishigaki Mayor Seeks Enhanced Patrol Around Disputed Isles," Jiji Press, Jun. 10, 2011; "4 local municipal assembly members land on disputed Senkaku Islands," *Japan Economic Newswire*, Jan. 3, 2012.

<sup>53</sup> Smith, *Intimate Rivals*, p. 224.

<sup>54</sup> "Wen Jiabao talked with Kan Naoto on phone, activating the Sino-Japanese premier hotline" [温家宝与菅直人通电话, 启动中日总理热线], Xinhua, Jun. 13, 2010, [http://www.gov.cn/lidhd/2010-06/13/content\\_1627486.htm](http://www.gov.cn/lidhd/2010-06/13/content_1627486.htm); Tuosheng Zhang, "Strengthening crisis management, the most urgent task in current China-U.S. and China-Japan security relations," *China International Strategy Review*, Apr. 11, 2021, [doi.org/10.1007/s42533-021-00067-x](https://doi.org/10.1007/s42533-021-00067-x).

<sup>55</sup> "Korea slams Japan's new textbook laying claim to Dokdo," *Korea Times*, Mar. 28, 2012.

<sup>56</sup> "Provocative 'Dokdo' post erected in Seoul irks Koreans" *Korea Times*, Jun. 22, 2012.

<sup>57</sup> "Japan, S. Korea Put Off Signing of Military Info Pact," Jiji Press, Jun. 29, 2012. This postpone resulted in a four-year hiatus before the pact was eventually signed in 2016.

<sup>58</sup> "S. Korean leader visits islets also claimed by Japan," *Straits Times*, Aug. 11, 2012.

<sup>59</sup> "US airs concern over rising tensions between Japan, S. Korea," *Japan Economic Newswire*, Aug. 23, 2012.

<sup>60</sup> "FOCUS: Japan, S. Korea move to repair ties at U.S. prodding," *Japan Economic Newswire*, Sept. 10, 2012; "Clinton urges Japan, S. Korea to Ease Tensions over Isles," Jiji Press, Sept. 9, 2012.

<sup>61</sup> "Du Ping: Chinese people applaud Lee Myung-bak's visit to Dokdo," [杜平: 李明博强势登岛, 中国人一旁叫好], Phoenix TV, Aug. 13, 2012, [http://phtv.ifeng.com/program/comment/detail\\_2012\\_08/13/16760818\\_0.shtml](http://phtv.ifeng.com/program/comment/detail_2012_08/13/16760818_0.shtml).

<sup>62</sup> Jun Hongo and Masami Ito, "Governor seen as goading administration into action," *Japan Times*, Apr. 18, 2012.

Ishihara and allegedly seeking to prevent the subnational actor from gaining greater influence in the dispute, the Noda cabinet decided to make a national purchase of the islets.<sup>63</sup>

Given that the island purchase was initiated and driven by the Tokyo governor (and the fundraising for the purchase managed through the Tokyo city government), a subnational actor, Beijing harbored a strong belief that the national government, if it chose to, was able to prevent the purchase without necessarily having to nationalize the islets. This perception was reflected in China's initial response that blamed Ishihara while urging the GOJ to block the purchase.<sup>64</sup> Beijing's initial response, as observed by a former senior U.S. government official with firsthand knowledge of this crisis, speaks to the difficulty for Chinese decisionmakers "not to mirror image their own system when dealing with other governments." Namely, Beijing seemed unable to believe that "the central government of a country does not have the ability to sway the decisions of private entities or local authorities."<sup>65</sup> Thus, when the Noda cabinet proposed to nationalize the Diaoyu/Senkaku Islands as a way to block Ishihara's purchase, Beijing saw the proposal as tantamount to evidence of a "good cop, bad cop" collusion. This conspiracy theory was reinforced after Japan's ambassador to China, Niwa Uichiro was reprimanded by MOFA for openly opposing the nationalization.<sup>66</sup>

Beijing's response was compounded by the ongoing Takeshima/Dokdo controversies and by Taiwan's reaction to the nationalization. Beijing's decision in June to prevent Chinese activists from sailing to the Diaoyu/Senkaku Islands drew fierce backlash in the wake of a protest voyage staged in July by Taiwan's activists who were escorted by five Taiwan coast guard ships and returned safely after sailing within one nautical mile of the islands.<sup>67</sup> Against this backdrop, the Chinese activists were permitted to set sail to and landed on the Diaoyu/Senkaku Islands on August 15. The Chinese landing was met with

immediate pushback from Japanese activists who staged another landing on the islands.

The Diaoyu/Senkaku nationalization generated profound implications for the maritime security landscape in Northeast Asia. China seized this opportunity to routinize the intermittent presence of its government vessels in the Diaoyu/Senkaku territorial sea, creating a "new normal" that effectively compromised Japan's administrative control over the area.<sup>68</sup> The Chinese and Japanese militaries were also brought to operate in close proximity, considerably raising the risk of miscalculation and incidents.<sup>69</sup> In facing the growing gray-zone challenges, open reaffirmation of the Diaoyu/Senkaku coverage by the U.S.-Japan security treaty has since become part of the standard lexicon of successive U.S. presidents when articulating their Japan policies.<sup>70</sup>

### Observations

Several observations can be made based on the empirical evidence. First, subnational and nonstate actors have played a key role in triggering maritime crises in Northeast Asia. To be sure, these actors are neither the root nor only cause of these crises. Instead, they should be considered as "key triggers" in that their actions-intentionally or inadvertently-significantly increase the salience of the disputes and inflame accumulated tensions, prompting central authorities to respond quickly. Second, in protracted conflicts over maritime territories and boundary delimitation, tit-for-tat dynamics are ever-present. All claimants have been initiators and responders. Third, the United States is a key third party as Washington is often dragged into a Sino-Japanese crisis and caught between its two allies. Last, initiatives taken by subnational or nonstate actors can be counterproductive by provoking precisely the reactions that such initiatives are intended to prevent.

In the long run, maritime crises aggravate the existing regional security dilemmas and leave all parties

## **"The Diaoyu/Senkaku nationalization generated profound implications for the maritime security landscape in Northeast Asia. China seized this opportunity to routinize the intermittent presence of its government vessels in the Diaoyu/Senkaku territorial sea, creating a 'new normal' ..."**

<sup>63</sup> "Ishigaki Assembly Votes to Seek State Purchase of Senkaku," Jiji Press, Apr. 19, 2012; "Japan national Govt Should Buy Senkaku Islands: DPJ Maehara," Jiji Press, Apr. 20, 2012; "Donations Pouring in for Tokyo's Senkaku Island Purchase," Jiji Press, May 2, 2012. While Noda and his subordinates openly emphasized the need to use the national purchase to block Ishihara's purchase plan, it was "well known within his inner circle that the underlying motivation was countering a perceived Chinese revanchist threat." Michael Green, et al., *Countering Coercion in Maritime Asia: The Theory and Practice of Gray Zone Deterrence* (Washington DC: Center for Strategic and International Studies), May 2017, p. 135.

<sup>64</sup> "April 18, 2012 MFA spokesperson Liu Weimin held regular press conference" [2012年4月18日外交部发言人刘为民举行例行记者会], <https://www.fmprc.gov.cn/ce/cees/chn/fyrth/t924078.htm>; Liu Jianguong [刘江永], "What is the ulterior motivation of Ishihara's 'island purchase scheme'" [石原 "买岛论" 安的什么心?], *People's Daily* (overseas edition), Apr. 20, 2012; Green, et al., *Countering Coercion in Maritime Asia*, 134-135.

<sup>65</sup> Author's phone interview, August 2019.

<sup>66</sup> Mure Dikie, "Tokyo warned over plans to buy islands," *Financial Times*, Jun. 6, 2012, <https://www.ft.com/content/af98fc54-ae7f-11e1-a4e0-00144feabd0c>; Zhongsheng, "Japan's 'island purchase' farce should come to an end" [日本 "购岛" 闹剧当休矣], *People's Daily*, Jun. 12, 2012.

<sup>67</sup> "Chinese authorities detain protest vessel bound for Japan-held islets: activist," *Japan Economic Newswire*, Jun. 15, 2012; "Taiwan Baodiao ship approached the Diaoyu Island and returned safely" [台保钓船贴近钓鱼岛后安全返回], *Voice of America*, Jul. 4, 2012, <https://www.voachinese.com/a/boat-to-disputed-island-back-home-to-taiwan-20120704/1363216.html>.

<sup>68</sup> Japan Coast Guard, *Japan Coast Guard Annual Report 2018* [海上保安レポート 2018], [https://www.kaiho.mlit.go.jp/info/books/report2018/html/honpen/1\\_02\\_chap1.html](https://www.kaiho.mlit.go.jp/info/books/report2018/html/honpen/1_02_chap1.html).

<sup>69</sup> Edmund J. Burke, et al., *China's Military Activities in the East China Sea: Implications for Japan's Air Self-Defense Force* (Santa Monica, CA: RAND Corporation, 2018).

<sup>70</sup> "Joint Press Conference with President Obama and Prime Minister Abe of Japan," Apr. 24, 2014, <https://obamawhitehouse.archives.gov/the-press-office/2014/04/24/joint-press-conference-president-obama-and-prime-minister-abe-japan>; "Joint Statement by President Trump and Prime Minister Shinzo Abe of Japan," Feb. 10, 2017, <https://www.mofa.go.jp/files/000227768.pdf>; "Readout of President Joseph R. Biden, Jr. Call with Prime Minister Yoshihide Suga of Japan," Jan. 27, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/27/readout-of-president-joseph-r-biden-jr-call-with-prime-minister-yoshihide-suga-of-japan/>.

less secure despite devoting more resources to military and paramilitary buildup.

## Recommendations

As of this writing, Sino-Japanese tensions surrounding the Diaoyu/Senkaku Islands are still rising.<sup>71</sup> In June 2020, the Ishigaki City Assembly changed the name of the district covering the Senkaku slands from “Tonoshiro” to “Tonoshiro Senkaku.”<sup>72</sup> China passed a new law in January 2021, authorizing its coastguardsmen to remove facilities built in areas under Chinese jurisdiction by foreign organizations or individuals without China’s permission.<sup>73</sup> In March 2021, Ishigaki authorities expressed the intention to install signposts on the Diaoyu/Senkaku Islands with the islands’ new district name.<sup>74</sup> It is conceivable that should Ishigaki forge ahead, Chinese coastguardsmen may attempt to block the city personnel from landing on the islands or remove the installed signposts. A faceoff would likely escalate, possibly into a skirmish that involves casualties, given that both the CCG and JCG now are authorized to use lethal force when defending their national sovereignty. As evidenced by the past maritime crises, it is in the common interests of all stakeholders in the region to prioritize crisis prevention and commit that such efforts will be sustained even in times of political difficulty.

There are several preventive mechanisms already established at the interstate level. The International Regulations for Preventing Collisions at Sea (COLREGs) adopted in 1972 remains the primary collision prevention mechanism in today’s world. The Code for Unplanned Encounters at Sea (CUES), an agreement that draws heavily on COLREGs, was signed in 2014 by 21 Pacific nations including the United States, China, Japan, and South Korea. Additionally, China and Japan agreed in 2018 to establish a bilateral maritime and aerial communication mechanism to regulate interactions between their militaries. The shortcomings of these mechanisms are obvious. They are nonbinding and do not prevent states from directing actions to enforce their laws or assert their sovereignty. Crisis communication systems have often been ignored.

To mitigate these shortcomings, regional stakeholders would ideally consolidate a comprehensive preventive mechanism without prejudice to sovereignty claims or eventual settlements. First, the existing preventive mechanisms could be expanded to incorporate a code of conduct regulating encounters of nonmilitary actors especially coast guards operating in the contested areas. Meanwhile, hotlines between senior leaders, defense agencies, coast guards, and local divisions of the military and paramilitary organizations should be established or (re)activated and staffed with officials who have the necessary authorization for prompt communication in contingencies.

Second, claimants could agree to stabilize the status quo by creating joint marine conservation areas encompassing the contested areas.<sup>75</sup> Parties could begin by setting the level of protection in these conservation areas at ‘no access’ and agree to stay clear of the areas as the first step to depoliticize the disputes. A joint commission could be established to co-manage the restricted areas, monitor the marine environment and human activities in the areas, and coordinate with law enforcement agencies to prevent attempted incursions. As tensions decrease, the joint commission could explore the prospect of relaxing the access restriction and opening the areas for marine research collaboration and eco-tourism.<sup>76</sup>

Third, claimants could consider adopting provisional operating procedures to guide the interdiction of subnational or nonstate actors attempting to enter the

**“Along with the interstate mechanisms, claimants can explore intrastate arrangements to discourage crisis-triggering behavior. While Northeast Asian countries have profoundly different domestic political systems, one principle holds regardless of the difference: central governments should have control on issues that can have national security implications.”**

disputed areas. In principle, the flag state is responsible for conducting such interdictions. But the flag state should also consider allowing for interdictions of its nationals and ships by the other party when necessary. Coast guards could conduct joint exercises for collaborative interdictions, on-the-spot handovers, and search and

<sup>71</sup> Kinling Lo, “China names undersea canyons and knolls in East China Sea amid rising tension with Japan over islands,” *South China Morning Post*, Jun. 24, 2020; “Chinese ships remain in Japanese waters near Senkaku Islands for record time,” *Japan Times*, Apr. 23, 2021, <https://www.japantimes.co.jp/news/2020/10/13/national/china-senkakus-record/>.

<sup>72</sup> “Ishigaki renames area containing Senkaku Islands, prompting backlash fears,” *Japan Times*, Jun. 22, 2020, <https://www.japantimes.co.jp/news/2020/06/22/national/ishigaki-senkaku-renaming/>.

<sup>73</sup> “Coast Guard Law of the People’s Republic of China” [中华人民共和国海警法], Jan. 22, 2021, [http://www.moj.gov.cn/Department/content/2021-01/25/592\\_3265256.html](http://www.moj.gov.cn/Department/content/2021-01/25/592_3265256.html).

<sup>74</sup> “Okinawa municipality seeking permission to land on Senkaku Islands,” *Yomiuri Shimbun*, Mar. 16, 2021, <https://the-japan-news.com/news/article/0007228427>.

<sup>75</sup> Scholarly and policy works have explored variants of the conservancy design. See, for example, Godfrey Baldacchino, “Diaoyu Dao, Diaoyutai or Senkaku? Creative solutions to a festering dispute in the East China Sea from an ‘Island Studies’ perspective,” *Asia Pacific Viewpoint*, vol. 57, no. 1, April 2016, 16-26; John W. McManus, Kwang-Tsao Shao and Szu-Yin Lin, “Toward Establishing a Spratly Islands International Marine Peace Park: Ecological Importance and Supportive Collaborative Activities with an Emphasis on the Role of Taiwan,” *Ocean Development & International Law*, issue 41, 2010, 270-280; Susan Thornton, “Averting Conflict in the South China Sea: Steps to Restore Rules and Restraint,” in Ryan Hass, et al., ed., *The Future of U.S. Policy toward China: Recommendations for the Biden administration*, Johns L. Thornton China Center, Brookings Institute, and Paul Tsai China Center, Yale Law School, November 2020, 46-51.

<sup>76</sup> Following the 2004 PRC landing episode, Beijing and the GOJ agreed upon a *modus vivendi* to manage attempted entry into the sensitive Diaoyu/Senkaku area. Under this arrangement, Japan promised not to detain Chinese nationals attempting to land on the Diaoyu/Senkaku Islands. In kind, China promised to block the activists’ ships from setting sail. This *modus vivendi* fell apart amidst the 2010 fishing trawler collision when the DPJ government threatened to subject the Chinese fishing skipper to Japan’s domestic law. After the 2012 nationalization crisis, the central governments of both countries again curbed protest voyages. A most recent unilateral effort was made by Okinawa Prefecture to restrict public access to the Diaoyu/Senkaku Islands. “New Japan leaders broke secret islet pact with China: media,” *Agence France Presse*, Oct. 18, 2010; “Okinawa police eye section to prevent Senkaku trespassing,” *Japan Times*, Mar. 30, 2021, <https://www.japantimes.co.jp/news/2021/03/30/national/okinawa-police-senkaku-rightwingers/>.

rescue. Parties could also establish transparent processes to discourage disproportionate use of force during interdictions. Incidents involving the use of lethal weapons should be properly documented and the appropriateness of the level of force be jointly evaluated. Additionally, claimants may need protocols on how information of incidents such as videos and photos should be managed especially when a crisis is still ongoing.

Along with the *interstate* mechanisms, claimants can explore *intrastate* arrangements to discourage crisis-triggering behavior. While Northeast Asian countries have profoundly different domestic political systems, one principle holds regardless of the difference: central governments should have control on issues that can have national security implications.

First, each claimant can install measures to improve coordination between its central and local governments on the existing maritime disputes. If such coordination cannot be achieved, the central government may consider recentralizing decision-making authority concerning the maritime disputes. Under this mechanism,

local moves regarding the disputed areas would be automatically rejected by the central government as unauthorized actions.

Second, state authorities may cut funding for research institutions, activist groups, public events, and propaganda apparatus that are dedicated to advocating the contested claims, although private donations are difficult to control. Meanwhile, state authorities could invest more resources to compensate for groups whose livelihood is negatively impacted by the loss of access to the disputed areas. States can also fund public education programs highlighting the benefits of preventing crises and protecting marine environment through the creation of conservancies.

Third, states may consider special legislation to hold crisis-triggering actors accountable. With each country having jurisdiction over its nationals, actors whose behavior causes property damages should be held financially liable. Claimants should also consider pressing criminal charges should an incident involve bodily harm.



# The Gaps in Japanese Maritime Security Law and the Senkaku Situation

Yurika Ishii<sup>1</sup>

## Introduction

This paper addresses the legal and operational gaps in Japanese law to defend its remote islands and the challenges that the U.S.-Japan alliance will encounter in the Senkaku situation.

Japan incorporated the Senkaku Islands in 1895, which were, according to the Japanese government, *terra nullius* at that time.<sup>2</sup> However, China started to claim sovereignty in 1971. It enacted the Law on the Territorial Sea and the Contiguous Zone in 1992, specifying the islands as a part of its territory. Since 2008, China has been regularly sending government ships to Senkaku Islands' waters to assert that they belong to China. These vessels stay and hover for several hours, interfering with the activities of Japanese fishing vessels. The intensity of these activities increased after September 2012, when the Japanese government bought the islands from their owner. In addition, China has been using maritime militia posing as ordinary fishing boats, creating a situation where there are increased threats to Japanese security, but Chinese official responsibility is not evident.<sup>3</sup>

While maritime security threats posed by the dispute over the Senkaku Islands are nothing new, the level of intensity has reached a new high with the implementation of the Chinese Coast Guard (CCG) Act of 2021.<sup>4</sup> This law authorizes the CCG to operate in contravention of the United Nations Convention on Law of the Sea (UNCLOS). There are three primary issues regarding the CCG Act from an international law perspective.

The first issue is that the law claims more than what China can justify under UNCLOS, and as a result, the freedom of the seas that every state enjoys is placed in jeopardy. The second issue is that the law may justify the CCG to take coercive measures potentially beyond what is permissible under international law. Lastly, the law obliges the CCG to "protect" its "maritime boundary" and monitor activities on the high seas and foreign EEZs. CCG conduct based on this act would contravene international law,<sup>5</sup> and the establishment of the CCG Act increases the risk of a standoff between the CCG, Japan Coast Guard (JCG), and Japan Maritime Self Defense Force (JMSDF).

Article 21 of the CCG Act is particularly pertinent to the Senkaku situation. It provides that "if foreign warships and foreign government ships used for non-commercial purposes that violate Chinese law and

regulations in the jurisdictional maritime water, the CCG has the right to take necessary warning and control measures to stop them, and order them to leave the water immediately."<sup>6</sup> Furthermore, "for those who refuse to leave and cause serious harm or threats, the CCG has the right to take measures such as forced towing and eviction." The "jurisdictional maritime water" includes not only the internal water and territorial sea but also the exclusive economic zone (EEZ), continental shelf and "other maritime areas over which China has jurisdiction."<sup>7</sup> UNCLOS Article 31 provides "[i]f any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately." Yet, CCG Act Article 21 authorizes the agency to use coercive measures which may violate the sovereign immunity that foreign warships and government ships used for non-commercial purposes enjoy in a foreign territorial sea. For China, it would include a JCG vessel entering into the Senkaku Islands' territorial sea. Furthermore, CCG Act Article 21 governs the jurisdictional maritime area instead of the territorial sea and covers government ships. To implement this provision beyond its territorial sea is an infringement of the freedom of the seas and the sovereign immunity of government vessels provided under UNCLOS Articles 87(1), 95, and 96.

Because China has a new administrative law to provide the basis for CCG conduct, it will likely strengthen and justify what the CCG can do in the territorial waters of disputed features and undelimited areas in the East China Sea. This paper addresses the legal and operational gaps in Japanese national security law in light of the new Chinese law. It will specifically address (1) the gaps between Maritime Security Operation order and Defense Operation order, (2) the challenges to coordination between JCG and JMSDF, and (3) the effect of these gaps on Japan-U.S. Alliance and cooperation from an international law perspective. Since this paper focuses on the legal perspective, it primarily discusses the first point.

The main finding of this paper is that these gaps are inherent in the structure of the Japanese national security law. To overcome the gaps and protect Japan's remote islands, seamless coordination between JCG and

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<sup>2</sup> For the Japanese position, see Ministry of Foreign Affairs, "Senkaku Islands," <https://www.mofa.go.jp/region/asia-paci/senkaku/index.html>. For the Chinese position, see "Statement of the Ministry of Foreign Affairs of the People's Republic of China," Sept. 10, 2012 [https://www.fmprc.gov.cn/mfa\\_eng/topics\\_665678/diaodao\\_665718/t968188.shtml](https://www.fmprc.gov.cn/mfa_eng/topics_665678/diaodao_665718/t968188.shtml).

<sup>3</sup> Jonathan G. Odom, "Guerrillas in the Sea Mist," *Asia-Pacific Journal of Ocean Law and Policy* 3, no. 1 (Jun. 8, 2018), 31–94, <https://doi.org/10.1163/24519391-00301003>; Andrew Erickson and Conor Kennedy, "China's Maritime Militia," 2016.

<sup>4</sup> Chinese Coast Guard Law, adopted on Jan. 22, 2021, entered into force on Feb. 1, 2021. The text of the CCG Act in Chinese is available at [http://www.moj.gov.cn/Department/content/2021-01/25/592\\_3265256.html](http://www.moj.gov.cn/Department/content/2021-01/25/592_3265256.html).

<sup>5</sup> Shigeki Sakamoto, "China's New Coast Guard Law and Implications for Maritime Security in the East and South China Seas," *Lawfare*, Feb. 21, 2021, <https://www.lawfareblog.com/chinas-new-coast-guard-law-and-implications-maritime-security-east-and-south-china-seas>; Raul Pedrozo, "Maritime Police Law of the People's Republic of China," *International Legal Studies* 97 (2021), 465.

<sup>6</sup> English translation of the law is available at <http://en.pkulaw.cn/display.aspx?id=09868c44d041e84ebdfb&lib=law>.

<sup>7</sup> The CCG Act does not provide the definition. However, Supreme Court has issued an interpretative note which defines the "jurisdictional maritime area" where the court has its jurisdiction. See Supreme Court, Interpretative Note on Jurisdictional Water, passed Supreme Court Judicial Committee, 1674th Meeting on Dec. 28, 2015, entered into force on Aug. 2, 2016. <http://www.court.gov.cn/zixun-xiangqing-24261.html>. See also Draft CCG Act, Article 74(2). The draft is available at <https://npcobserver.com/wp-content/uploads/2020/11/Coast-Guard-Law-Draft.pdf>.

JSMDF and deeper cooperation between Japan and the U.S. are necessary.

### **The gap between Maritime Security Operation Orders and Defense Operation Orders**

The first gap concerns a situation where Japanese agencies must protect the safety and security of Japanese territorial seas. Both JCG and JMSDF have such responsibilities. Yet, their mandates and functions are structurally different. The current JCG Act Article 2(1) provides that its mandates are, among others, to encourage the compliance of law at sea, to maintain navigational order of vessels at sea, and to secure the safety and security of the sea. JCG personnel are authorized to take specific measures against foreign vessels within Japanese jurisdiction to pursue such mandates.

The JCG officers may order the master of a vessel to submit documents required by law to be kept onboard the ship, and they may conduct on-site inspections. In addition, if a JCG officer determines that a crime is about to be committed at sea or believes a dangerous situation, including a natural disaster, to be imminent, the officer shall take necessary measures. This includes stopping the vessel or suspending its departure, moving the ship to a designated place, and discharging the crew and the cargo. To perform these duties, they can use coercive measures such as ramming or shooting water cannons as part of the necessary measures. There is a strict statutory limit on the use of weapons by the JCG and the SDF against people within Japanese territory. The “use of weapons” means using machines, instruments, and devices, such as firearms, explosive materials, and swords, to kill people directly or destroy objects through armed hostilities.<sup>8</sup>

The JCG Act Article 19 authorizes JCG personnel to carry weapons to pursue their mandates. Article 20(1) provides that the use of weapons provision under the Police Duties Execution Act shall apply *mutatis mutandis*.

### **“The JCG Act... authorizes JCG personnel to carry weapons to pursue their mandates... Article 20(2) was inserted in the JCG Act of 2001 so that JCG may take coercive measures against foreign vessels conducting non-innocent passage.”**

The Police Duties Execution Act Article 7 allows police personnel to use weapons when there are reasonable grounds for the necessary apprehension of a criminal suspect or the prevention of his or her escape, for self-protection or the protection of others, or the suppression of resistance to the execution of the police’s official duty. However, the police may not inflict injury upon any person except in certain limited cases.<sup>9</sup> The cases where the police may inflict injury comprise those falling under Penal Code, Article 36 (self-defense) and Article 37 (necessity).<sup>10</sup> Also, they include cases (1) when a person is committing or is suspected of having committed a serious crime which is subject to the death penalty, life imprisonment or imprisonment for a maximum period of not less than three years, or (2) when the police try to arrest

a person under an arrest warrant or execution of a subpoena or detention warrant, and the suspect or a third person resists the official’s execution of duty. Therefore, regardless of the differences between the land and the sea environment, the same requirements are imposed on JCG’s use of weapons. The JCG relied on this provision when it fired warning shots towards suspicious vessels at the Noto Peninsula in 1999 and Amami-Oshima in 2001.<sup>11</sup>

On April 25, 2021, at a joint meeting of the Liberal Democratic Party’s National Defense Subcommittee and the National Security Council, the Japanese government clarified that if a foreign government ship tries to land personnel on the Senkaku Islands, it may be possible to classify such conduct as a serious crime and use weapons to suppress the resistance as an exercise of the Police Duties Execution Act.

Article 20(2) was inserted in the JCG Act of 2001 so that JCG may take coercive measures against foreign vessels conducting non-innocent passage. The government proposed the amendment because of the increasing number of suspicious vessels, mainly from the Democratic People’s Republic of Korea. It provides that JCG is allowed to use weapons against a foreign ship, except warships and government ships used for non-commercial purposes conducting non-innocent passage as provided under Article 19 of UNCLOS, if the officer reasonably believes that, from the appearance of the vessel, the manner of navigation, the abnormal behavior of the crew, and other relevant factors, the situation satisfies certain conditions. The first of these conditions is that the vessel conducts non-innocent passage as provided under Article 19 of UNCLOS. The second is that there is a probability that if the navigation of the vessel is left as it is, it will repeat such non-innocent passage in the future. The third is that such navigation is for committing a serious crime within Japanese territory which is punishable by the death penalty, life imprisonment, or imprisonment with or without work for not less than three years. The fourth

condition is that appropriate measures, based on information that can only be obtained by inspecting the concerned vessel, are necessary to prevent the occurrence of such a serious crime. In other words, the standards of this provision are higher than what Article 25 of UNCLOS provides. The provision is not applicable against foreign sovereign immune vessels. The JCG has never used weapons per Article 20(2).

When JCG cannot deal with a threat, the Defense Minister may issue a Maritime Security Operation order. Article 82 of the SDF Act provides that, when there is a specific necessity to protect human lives or properties at sea or maintain security, the SDF units take necessary operations at sea under the Minister of Defense’s order with the approval of the Prime Minister.

<sup>8</sup> Kudo Atsuo, Director of the Cabinet Legislation Bureau, 121<sup>st</sup> Diet, House of Representatives, Special Committee on Peace Keeping Operation, No. 3 at 3, Sept. 25, 1991.

<sup>9</sup> Police Duties Execution Act, Article 7.

<sup>10</sup> Penal Code, Act No. 45 of 1907.

<sup>11</sup> For the facts of these cases, see Mark J. Valencia and Ji Guoxing, “The ‘North Korean’ Ship and U.S. Spy Plane Incidents: Similarities, Differences, and Lessons Learned,” *Asian Survey* 42, no. 5 (October 1, 2002), 723–32, <https://doi.org/10.1525/as.2002.42.5.723>.

Article 93(1) and (3) of the SDF Act provides that the SDF shall use weapons per Article 20(1) and Article 20(2) of the JCG Act, respectively. As explained in the previous section, Article 20(1), which applies Article 7 of Police Duties Execution Act *mutatis mutandis*, only stipulates the case for arresting or suppressing criminals. The government has never expressed its position on whether the JMSDF can use weapons against foreign sovereign ships under the SDF Act Article 93(1). Article 93(3), which applies Article 20(2) *mutatis mutandis*, excludes foreign warships and government ships from its scope.<sup>12</sup> Whether and to what extent the SDF may use force against foreign sovereign immune vessels to expel them from the Japanese territorial sea, therefore, requires interpretation of the SDF Act and international law.

In practice, the Japanese government has been quite cautious in deploying the JMSDF under the Maritime Security Operation order. It has chosen this option only three times. This is because the government is sensitive about the political consequences of such issuance, and not only looking at the gravity of the situation. For example, in August 2016, approximately 200 Chinese fishing boats escorted by CCG approached the Senkaku Islands. It was evident that JCG could not deal with the situation, and there was a real danger that a collision between the fishing boats and JCG vessels could occur. However, the government did not issue a Maritime Security Operation order.<sup>13</sup> In addition, a cabinet decision of 2015 expedites the issuance of this order when a foreign warship enters into Japanese territorial sea and conducts non-innocent passage. Yet, the cabinet decision does not cover CCG vessels' entrance into the Senkaku Islands' territorial sea because,

technically, the vessel is not a warship.

The Japanese government has explained that when the SDF can no longer deal with the situation under the Maritime Security Operation order, it may act under the Defense Operation order. The requirements for an exercise of individual self-defense are the following: first, an armed attack against Japan from the outside of the country occurs;<sup>14</sup> second, self-defense may be used when there are no other appropriate means available to repel the attack and ensure Japan's survival and protect its people; third, the use of force should be limited to the minimum extent necessary for self-defense.

The Defense Operation order authorizes the SDF to resort to force, which is prohibited under Constitution

**"In practice, the Japanese government has been quite cautious in deploying the JMSDF under the Maritime Security Operation order. It has chosen this option only three times. This is because the government is sensitive about the political consequences..."**

Article 9. The SDF may only resort to a 'use of force' (*Buryoku no kōshū*) to defend Japan to protect the country's peace and independence. Under Article 88 of the SDF Act, the government defined the term as "combat acts done as a part of international armed conflict by material and human organizations by states."<sup>15</sup> Furthermore, the government has defined "armed attack" as "an organized and planned use of force done by a state or a quasi-state entity."<sup>16</sup> An armed attack includes an attack against Japanese territory and the SDF's vessels on the high seas.<sup>17</sup> However, the government has not expressed its view regarding attacks against JCG vessels to the author's knowledge.

Consequently, China or any other country can exploit this gap where the mandate under Maritime Security Operation is not enough to cope with the threat, but the situation is not grave enough to issue a Defense Operation order.

### The Challenges of Coordination between the JCG and the JMSDF

The mechanism that the JMSDF uses to defend the maritime area requires smooth coordination with JCG. In 2015, when the SDF Act was amended, the government decided not to create an option for the SDF to become involved in gray zone activities. Instead, it chose to deal with such situations through close cooperation of the two organizations. However, there remain challenges that make such operations difficult. Their differences lie in their mandates and functions, and their size, training, equipment, and culture.<sup>18</sup> The JCG is a civilian law

enforcement organization with about 11,000 personnel. The JMSDF is a military agency with 42,000 personnel. The JCG Act Article 25 provides that the organization will never function as, and must not be incorporated in, the military. Therefore, there is a strong hesitation

among JCG officers to engage in operations that can be considered military in nature. However, a seamless transition from the JCG's law enforcement activities to the JMSDF's Maritime Security Operations requires JCG's commitment to protecting sovereignty. Since the structures of the two organizations and the maneuverability of the ships are quite different, experts point out that JCG is likely to step back from the scene once JMSDF units arrive. At this stage, the on-site information exchanges, including strategy sharing, are essential mechanisms to prevent an actual conflict.<sup>19</sup>

<sup>12</sup> Takeshi Nakano, "Buryoku Koshi / Buki Shiyo No Hoteki Kisei [The Legal Regulation of The Use of Force / Use of Weapons] (Part I)," *Jichi Kenkyu* 93, no. 9 (2017): 73–93. Regarding the distinction between the use of force and use of arms, see also Atsuko Kanehara, "The Use of Force in Maritime Security and the Use of Arms in Law Enforcement under the Current Wide Understanding of Maritime Security," *Japan Review* 3, no. 2 (2020), 35–53.

<sup>13</sup> Kentaro Furuya, "Maritime Security—The Architecture of Japan's Maritime-Security System in the East China Sea," *Naval War College Review* 72, no. 4 (2019), 29.

<sup>14</sup> In the case of "collective self-defense," an armed attack against a foreign country that is in a close relationship with Japan occurs, from which the survival of Japan is threatened, and circumstances are created that pose a clear danger that would fundamentally overturn the Japanese people to life, liberty, and pursuit of happiness.

<sup>15</sup> The government submitted its position paper on "The Relationship between The Use of Weapons and Use of Force" on Sept. 27, 1991, to HR, Special Committee of International Peace Cooperation and Others. See Ishibashi Daikichi, Member, 122nd Diet, HR, Special Committee of International Peace Cooperation and Others, No. 3 at 19, Nov. 18, 1991.

<sup>16</sup> Togo Kazuhiko, MOFA Director of Bureau of Treaties, 145<sup>th</sup> Diet, HC, Special Committee for Japan-US Guideline, No. 9 at 28, May 20, 1999.

<sup>17</sup> Fukuda Yasuo, Secretary of the Cabinet, 154<sup>th</sup> Diet, HR, Special Committee on the Response to an Armed Attack Situation, No. 18 at 8, Jul. 24, 2002. See also Masahiro Sakata, *Seihu No Kenpo Kaishaku* (Yuhikaku [Japanese], 2013), 32.

<sup>18</sup> Furuya, "Maritime Security—The Architecture of Japan's Maritime-Security System in the East China Sea," 40.

<sup>19</sup> Furuya, 15.

## U.S.-Japan Relations

The U.S.-Japan Alliance has been a pillar of Japanese maritime security and has determined Japanese national policy. However, there remain several differences in the two nations' domestic laws and understandings of international law.<sup>20</sup> Both the U.S. and Japanese governments have confirmed that Article 5 of the U.S.-Japan Treaty of Mutual Cooperation and Security applies to the Senkaku Islands. The provision stipulates that "[e]ach Party recognizes that *an armed attack* against either Party in the territories under the administration of Japan would be dangerous to its peace and safety and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes" (emphasis added). A recent affirmation is the joint statement of the two governments issued in March 2021 which confirmed that "the United States is unwavering in its commitment to the defense of Japan under Article 5 of our security treaty, which includes the Senkaku Islands. The United States opposes any unilateral action that seeks to change the status quo." However, the narrow Japanese understanding of the armed attack concept may be a hurdle in its application. There will likely be a time lag between when the Chinese maritime militia and CCG use aggressive force in the Senkaku area and when Japan declares the events to be an armed attack.

Furthermore, the application of Article 5 is on the premise that Japan effectively administers the territory at the time of an armed attack. Because the U.S. would not

intervene in disputes over territorial titles, there would be a different consideration if China took control. For an effective operation of the Japan-U.S. Alliance, close collaboration among agencies would be indispensable. The latest Guidelines for Japan-U.S. Defense Cooperation of 2015 specified that the allies would (1) increase information sharing and policy consultations, (2) promote security cooperation, and (3) conduct bilateral programs, including defense planning in case of an armed attack against Japan, and cooperation planning in situations in areas surrounding Japan.

## Conclusion

This paper demonstrates that the unique structure of Japanese national security law has created security gaps. To overcome these gaps and protect Japan's remote islands, seamless coordination between the JCG and JSMDF and deeper cooperation between Japan and the U.S. are necessary. In addition, states in the Asian region, most notably the coastal states of the South China Sea, and stakeholders such as the United States, have to take the lead in advancing the legal order amidst the increasingly tense competition between Washington and Beijing. The importance of the rule of law should be upheld both in diplomacy and maritime security.

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<sup>20</sup> James Kraska and Yusuke Saito, "The Law of Military Operations and U.S. - Japan Alliance," *Naval War College Review* 73, no. 3 (2020): 89; Hideshi Tokuchi, "Japan-U.S. Alliance as a Maritime Alliance and International Law," in *Strengthening the U.S.-Japan Alliance: Pathways for Bridging Law and Policy*, ed. Nobuhisa Ishizuka, Masahiro Kurosaki, and Matthew C. Waxman (Columbia Law School, 2020), 64.



# Maritime Security in the East China Sea: Japan's Perspective

Atsuko Kanehara<sup>1</sup>

## Introduction

This paper focuses on “the rule of law,” as a long-standing principle to maintain and defend maritime security. It has been the main pillar of Japanese diplomacy and ocean policy for almost a decade.<sup>2</sup> This paper highlights key issues in the East China Sea, but without excluding the South China Sea. The rule of law forms as the fundamental principle for a Free and Open Indo-Pacific.<sup>3</sup> Accordingly, an examination of the rule of law is important for understanding and coping with the situation in the East China Sea and the South China Sea.

After the introduction, a nuanced background of the tense situations in the East China Sea is provided. This paper has touched upon the Korea-Japan relationship in the Sea of Japan, for the purpose of comparing it with the China-Japan relationship. The confirmation of the three principles of the rule of law will follow. The subsequent sections will provide some analyses on the situations in the East China Sea and the South China Sea by applying each of the three principles.

## Tense Situations in the East China Sea

In the East China Sea, tense situations have persisted mainly due to two factors that are closely related to each other. First, there is an issue and a dispute regarding the territorial sovereignty of the Senkaku Islands.<sup>4</sup> According to Japan's official position, while there has been an issue between China and Japan regarding the sovereignty of the Senkaku Islands, there is no dispute.<sup>5</sup> This is in contrast to Japan's position on the territorial sovereignty of the Takeshima Islands, between Korea and Japan, where there has been a dispute.<sup>6</sup>

Second, there are undelimited maritime areas in the East China Sea due to a lack of agreements on maritime delimitation. The issue of territorial sovereignty over the Senkaku Islands has made the desired delimitation agreements very difficult to reach between China and Japan. The difference in positions between the two countries with respect to the international legal rules on maritime delimitation, particularly those under the United

Nations Convention on the Law of the Sea (UNCLOS) is not the sole hurdle to overcome for achieving maritime delimitations. In delimitating maritime areas, the legal status and effects of islands to the delimitation line is a critical issue. Thus, without determining the territorial sovereignty of the island concerned, final delimitation lines are very difficult to be drawn. In fact, there are no delimitation agreements between China and Japan, on both the continental shelf and the exclusive economic zones. In 2008, they reached a mutual understanding and produced a political document on joint development of the continental shelf. It sets joint development zones that cross over the median line between the two countries.<sup>7</sup> However, they have realized no significant progress in the development of the natural resources on the continental shelf.<sup>8</sup>

China, irrespective of the mutual understanding on joint development, has continuously constructed oil rigs that are very near to the median line between the two countries. These acts are highly proverbial as China has already gone beyond exploration and unilaterally engaged in the exploitation of the natural resources of the continental shelf. Furthermore, by taking advantage of the non-existence of any delimitation agreement on the exclusive economic zones, China has periodically conducted marine scientific research in the sea area located on Japan's side of the median line between the two countries. Under UNCLOS, a foreign country wishing to conduct marine scientific research in the exclusive economic zone of a coastal state is required to seek consent from that coastal state.<sup>9</sup>

In addition to the delimitation problems regarding continental shelf and exclusive economic zones between China and Japan, there has been a seriously tense situation in the territorial sea surrounding the Senkaku Islands. These tensions have grown more severe due to the enactment of the amended Coast Guard Law of China, on February 1, 2021.<sup>10</sup> Both China and Japan are claiming territorial sovereignty over the Senkaku Islands and the territorial sea thereto. To demonstrate its territorial

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<sup>2</sup> As the important declaration of Japan's diplomatic policy based upon the rule of law. Shinzo Abe, Keynote Address, IISS Asian Security Summit “Shangri-La Dialogue,” June 5, 2014, [https://www.mofa.go.jp/tp/nsp/page18e\\_000087.html](https://www.mofa.go.jp/tp/nsp/page18e_000087.html).

<sup>3</sup> Currently Japan uses “view” in place of “strategy” that initially appeared as “Free and Open Indo-Pacific Strategy.” There are some political reasons, but no substantial changes to the idea.

<sup>4</sup> Regarding the term dispute, this paper is in accordance with the international law parlance. Dispute is a legal technical term that has established by the long jurisprudence of the world courts, namely, the Permanent Court of International Justice and as its successor the International Court of Justice. The Permanent Court of International Justice declared a typical definition of dispute, in the case of the Mavrommatis Palestine Concession, *Affaire des Concessions Mavrommatis en Palestine, Arrêt, Le 30 août 1924, Recueils des Arrêts, Serie A, No. 2*, pp. 11-12. The subsequent jurisprudence has refined it, but the essence still remains. As explained below, the Japanese government is coherent in applying this legal parlance in describing the situation between China and Japan regarding the Senkaku Islands, and the situation between Korea and Japan regarding the Takeshima Island. The Japan's positions are in accordance with the legal parlance. In this regard, Japan has been totally coherent. A difference exists in Japan's appraisal of the situations that are between China and Japan, on the one hand, and that on the other hand, between Korea and Japan. In this paper, therefore, for description of the situation regarding the Senkaku Islands, to precisely reflecting Japan's position, I will use the term “issue” not that of “dispute.”

<sup>5</sup> Taking its coherent stance, Japan does not admit an existence of a dispute between China and Japan regarding the Senkaku Island. This is because Japan has taken a position that the conditions for an existence of a dispute have not been met.

<sup>6</sup> Regarding the Takeshima Island, while Japan in accordance with the legal parlance describes the situation as a dispute, Korea does not admit it.

<sup>7</sup> Mutual Understanding (Political Agreement) of June 18, 2008.

<sup>8</sup> In comparison, on the January 30, 1974, Korea and Japan concluded two agreements on their continental shelf. One is regarding the delimitation of the northern part of the continental shelf, and the other is on the joint development of the natural resources of the southern part of the continental shelf.

<sup>9</sup> UN General Assembly, *Convention on the Law of the Sea*, Article 245. If the sea areas are undelimited sea areas, such a unilateralism should be refrained from under Article 83, Paragraph 3. Here it suffices to point out these provisions.

<sup>10</sup> The Coast Guard Law of China, unofficial English translation is available at <https://www.lawinfochina.com/display.aspx?lib=law&id=34610>.

sovereignty, China persistently dispatches its public vessels, warships, and in some cases, fishing boats flying Chinese flags. Those public vessels chase fishing boats flying Japanese flags as if they were conducting law enforcement against the Japanese fishing boats. Accompanying the public vessels, China also dispatches its warships. Its aim is overt demonstration of China's territorial sovereignty over the Senkaku Islands. Chinese fishermen, sometimes deploying in groups of several hundred fishing boats, include maritime militia vessels. Considering the tense situation, unilateral claims of rights over maritime areas and aggressive activities backed up by the presence of a military force seriously contribute to the escalation of the tense situation in the East China Sea.

### The rule of law

Considering this situation, how should Japan cope through the principle of "the rule of law?" It should be useful to define first the situations in accordance with the rule of law before proposing measures to cope with them. The rule of law consists of the following three principles that appeared in the Keynote Address by H. E. Shinzo Abe, Prime Minister of Japan at the 13<sup>th</sup> IISS Asian Security Summit, known as the "Shangri-La Dialogue."<sup>11</sup> In the subsequent sections, the paper will take up these three points in this order. The three principles are:

- (i) making and clarifying claims based on international law;
- (ii) not using force or coercion in trying to drive their claims;
- (iii) seeking to settle disputes by peaceful means.

The next section will examine the situation in the East China Sea and the South China Sea caused by China in accordance with the first principle of the rule of law.

### Claims based on International Law

According to the first principle of the rule of law, any rights should have their grounds in international law. As international society is underpinned by the co-existence of equal sovereign states, it is different from domestic societies. International society has no authoritative legislative organs that can make binding laws on sovereign states. Sovereign states themselves create international law. Agreements of sovereign states are principal grounds for the binding force of international law. It mainly takes the forms of treaties and customary laws. There are many fields within international law, such as the law of the sea, the law on the use of force, the law of state responsibility, the law on territorial acquisition, and the law of diplomatic relations, among many others. In the field of the law of the sea, UNCLOS is the most important treaty. UNCLOS was adopted in 1982, succeeding the 1958 four Geneva Conventions on the law of the sea. UNCLOS came into force in 1994. In parallel, customary law has

traditionally played an indispensable function in the law of the sea.

China has unilaterally claimed historical rights over the extravagantly wide sea areas encircled by the so-called nine-dash lines in the South China Sea. There are no agreements among states regarding such claims, nor any common recognition. Unilateralism is contrary to the consensual basis of international law.<sup>12</sup>

There are, however, some cases in which international law allows sovereign states to act unilaterally. Among them are recognition of states and government, conferment of nationality, and demarcation of jurisdictional sea areas. Here, it is useful to take the example of the unilateral demarcation of jurisdictional sea areas. Coastal states are allowed to unilaterally establish the limits of territorial seas, exclusive economic zones, and continental shelves. After declaring the unilateral nature of the demarcation of sea areas, the International Court of Justice clearly stated in one of its rulings that the validity of the unilateral demarcation of sea areas should be in accordance with the relevant

**"The rule of law consists of the following three principles... (i) making and clarifying claims based on international law; (ii) not using force or coercion in trying to drive their claims; and (iii) seeking to settle disputes by peaceful means."**

international legal rules for obtaining its validity in relation to other states. The frequently cited part of the judgment rendered by the International Court of Justice in the 1951 Fisheries Case reads:<sup>13</sup>

Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law. (emphasis added)<sup>14</sup>

China's claimed historic rights were clearly rejected by the arbitral tribunal in the famous South China Sea arbitration that rendered its award on the 12<sup>th</sup> of July in 2016 for the reason that it is contrary to UNCLOS, a treaty law.<sup>15</sup> China then declared the ruling null and void. In this regard, it is very important to note that China has emphasized customary international law as the legal ground of its claimed historic rights. China, well understanding that its historic right claim does not find any legal justification under UNCLOS, then proceeded to seek legal justification under customary international law.<sup>16</sup> China's legal strategy has both positive and negative aspects in relation to international law and the rule of law.

On the positive side, China clearly recognizes the necessity for its claimed historic rights to be based upon customary international law. In this sense, China seems to admit the role of international law for the justification of its claimed historic rights. In other words, China would not claim rights outside the legal world of international

<sup>11</sup> See note 1.

<sup>12</sup> Precisely speaking, different from treaties there is a theoretical argument as to whether customary international laws have the legal binding force on sovereign States solely for the reason that they reflect tacit agreements of States. There may be other elements than tacit agreements in customary laws. Here it suffices to confirm the existence of such an argument.

<sup>13</sup> Fishery Case (United Kingdom v. Norway), Judgment of Dec. 18, 1951, *ICJ Reports* 1951, 116.

<sup>14</sup> *Ibid.*, 132.

<sup>15</sup> The South China Sea Arbitration (The Republic of Philippines v. The Republic of China), Merits, Award of 12 July, <https://pcacases.com/web/sendAttach/2086>.

<sup>16</sup> Atsuko Kanehara, "Validity of International Law over Historic Rights: The Arbitral Award (Merits) on the South China (2018) Dispute," *Japan Review*, Vol. 2, No. 3, Winter (2018), 10-12.

law. On the negative side, China abuses customary law. The customary law that China insists to be applicable to the South China Sea and supportive of its claims, has not been established. Thus, China cannot find any legal justification for claimed historic rights under international law. China's claim based on a non-existing customary law is really a legal abuse. Beyond this abuse, it must be mentioned that states are not allowed to change international law by force. This brings us to the second principle of the rule of law.

### "Forcible Measures" at Sea

The second principle of the rule of law is "not using force or coercion in trying to drive claims." International law, by its fundamental principle, prohibits the use of force and the threat by force. Article 2, Paragraph 4 of the United Nations Charter provides for it. The provision reads:

*All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.*

This principle has firmly been established not only as a treaty law under the United Nations Charter but also as customary international law. Nonetheless, it is very difficult to precisely define the meaning of the use of force and the threat by force.<sup>17</sup> Therefore, in place of defining the meanings, it may be more significant and useful, as a practical way of analysis, to look concretely at what is taking place in the East China Sea and the South China Sea.<sup>18</sup>

In the East China Sea, as already explained, China's activities in the territorial sea surrounding the Senkaku Islands, have caused and seriously aggravated the tense situation with Japan. Beijing has frequently dispatched Coast Guard vessels into these waters and Chinese fishermen have also come to the territorial seas of Japan, in some cases escorted by China's Coast Guard vessels and in other cases include maritime militia forces. Even Chinese military vessels enter the territorial seas of Japan. The same offensive conduct takes place in the South China Sea, where China has constructed military facilities on features over which other countries have claimed territorial sovereignty. These Chinese acts are aimed at overtly demonstrating China's sovereign control over those sea areas and the land features concerned.

Chinese Coast Guard vessels were recently legally incorporated into the Chinese military. In addition, the amended Coast Guard Law of China entered into force on February 1, 2021.<sup>19</sup> These changes empower the designated law enforcement organs to use force for the purpose of responding to any infringement of China's core interests. The core interests certainly include sovereignty.<sup>20</sup> The definition of law enforcement is not easy to set, and the use of arms or weapons in the context of law enforcement is different from the use of force that is prohibited by international law.<sup>21</sup>

Even if Chinese vessels illegally use weapons for the purpose of its alleged law enforcement against, for instance, foreign military vessels, governmental vessels, and even fishing boats, the targeted states or the flag states of the fishing boats might be prevented from taking effective measures against China. Those foreign states cannot take compulsory measures against Chinese vessels at sea, and they cannot file a suit against China in their domestic courts, either. This is because, under international law, Chinese public vessels enjoy immunity from being the targets of these measures and from domestic court procedures of foreign countries. There is another possibility that foreign states may take stronger measures with justification as countermeasures under international law against illegal acts by China. In such a case, however, they need to refrain from escalating the tense situations. For that purpose, they need to carefully analyze the interests to be infringed by the Chinese acts, such as the maritime order at their territorial seas, territorial sovereignty, and safety of fishermen holding their nationalities, and they should take corresponding measures that are enough to be effective in protecting their interests.

Then, are those acts by China regarded as the use of force and/or the threat by force? In reality, as a matter of fact, nobody denies that these Chinese strategies of making use of its Coast Guard vessels and even its military vessels, and sending fishing boats on which militias are on board, have posed serious threats to neighboring states. The amended Coast Guard Law of China legally supports such behavior and the use of force under its domestic law. Most Southeast Asian countries and Japan share a common negative view of China and its maritime behavior. The tense situations caused by China have already persisted for over a decade in the East China Sea and the South China Sea.

In sum, it is safe to say that those Chinese strategies are regarded as the use of "forcible means." This is so, considering the actual threats posed by China on Southeast Asian countries and Japan. Those Chinese activities have been conducted for the purpose of overt demonstration of its claimed territorial sovereignty over the land features and their territorial seas and in contradiction to the claims of sovereignty and effective jurisdiction or administration by other States. Thus, by using "forcible measures," China is changing the *status quo* and challenging the relevant international laws. In a manner totally contrary to the Chinese approach, the disputes regarding territorial sovereignty and maritime rights should be peacefully resolved.

This brings us to the third principle of "the rule of law," namely the peaceful settlement of disputes.

### Peaceful Settlement of Disputes

Under international law, states should peacefully resolve disputes. Article 2, Paragraph 3 typically provides for it. This provision reads:

<sup>17</sup> There is much discussion on the interpretation of the use of force and threat by force under Article 2, Paragraphs 4 of the United Nations Charter. In this regard, Atsuko Kanehara, "The Use of Force in Maritime Security and the Use of Arms in the Current Wide Understanding of Maritime Security," *Japan Review*, Vol. 3, No. 2, Fall (2019), 40-41.

<sup>18</sup> Atsuko Kanehara, "International Law as a Tool to Combat China," *Japan Review*, Vol. 4, No. 1, Summer (2020), [https://www.jiia-jic.jp/en/japanreview/pdf/04JapanReview\\_4-1\\_summer\\_Kanehara\\_web.pdf](https://www.jiia-jic.jp/en/japanreview/pdf/04JapanReview_4-1_summer_Kanehara_web.pdf).

<sup>19</sup> Unofficial English translation of the Coast Guard Law of China, see note 9.

<sup>20</sup> Article 1 of the Law provides for the core interests. It reads: This Law is enacted for the purposes of regulating and guaranteeing the performance of duties by coast guard agencies, *safeguarding national sovereignty, security, and maritime rights and interests*, and protecting the lawful rights and interests of citizens, legal persons, and other organizations. (emphasis added)

<sup>21</sup> Regarding the use of arms or weapons for the purpose of law enforcement, see Kanehara, note 16 above, 43-46. The use of force that is prohibited under Article 2, Paragraph 4 of the United Nations Charter and the use of arms for the purpose of law enforcement are distinguished from each other. *Ibid.*, 40-41.

*All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.*

Article 33 indicates peaceful means of dispute resolution. It reads:

*The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.*

There are various ways of dispute settlement for state-to-state disputes. As for non-judicial means, there are, such as negotiation, enquiry, mediation, conciliation. As for judicial measures, states can use arbitral tribunals and courts of justice, such as the International Court of Justice (ICJ) and the International Tribunal for the Law of the Sea (ITLOS).

Among these various means, there has been a preference among Asian countries to avoid arbitral or judicial procedures. Nevertheless, recently, we can count several cases that were subjected to arbitral and judicial procedures, namely, by the ICJ,<sup>22</sup> ITLOS,<sup>23</sup> and arbitral

## **“Japan is a stakeholder with an interest in freedom of navigation in the South China Sea, challenged by China’s claim of historic rights...”**

tribunals. Not to mention, the South China Sea dispute is an example of an arbitral tribunal ruling, although China was absent from all the procedures.<sup>24</sup> Japan, thus far, has, for three times, offered to bring its territorial dispute with Korea on the Takeshima Islands to a judicial settlement, through the ICJ. However, Korea has consistently refused Japanese offers. Therefore, no judicial rulings have been realized among China, Korea, and Japan on the territorial dispute and disputes on the maritime delimitation.

The critical point is the significant merit of arbitral or judicial procedures particularly from the perspective of the law of the sea. The principal function of arbitral or judicial procedures is dispute resolution. This is the same as that of non-judicial means of dispute resolution. Nonetheless, there is an inherent function discharged by arbitral or judicial procedures, that is accompanying their function of dispute resolution. Outcomes of arbitral or judicial procedures on the basis of international law, such as UNCLOS, are universally applicable to all states in the world. In comparison, for non-judicial means of dispute settlement procedures, particularly by negotiation, the focus resides principally in the special situations that exist only between the party-states to the dispute concerned.<sup>25</sup>

Arbitral or judicial procedures in order to resolve disputes, at the same time, declare the rules of the law of the sea that are relevant to the disputes in front of them, and they provide the authoritative interpretation of these rules so as to apply them to the dispute. Furthermore, in declaring, interpreting, and applying international law, both arbitral tribunals and judicial courts never exclude

indispensable consideration of particular situations in each case.

Then, why is the universal application of international law which is declared by arbitral or judicial procedures so significant from the perspective of the law of the sea? This is because all maritime issues have general implications for all states in the world. Even resolution of bilateral disputes and treatment of regional maritime issues have worldwide impacts on other states. In this regard, it is important to exactly understand that the seas entirely cover our globe as a whole, and states make use of the seas for various purposes.

Firmly based upon this understanding, we can derive the critical principles that we have to share: first, at the bilateral, regional, and global levels, states need to take appropriate measures in order to cope with wrongdoers or violators of international law; second, in addition, they should take cooperative measures for forming a strong legal and political circle, from which no wrongdoers can escape. Only through the cumulative effects and synergy of the measures taken at various levels will the desired policy results be achieved.<sup>26</sup>

Japan has been coping with China in the East China Sea at a bilateral level. At a regional level, Japan is cooperating with the coastal states of the South China Sea, such as Vietnam, Singapore, and Indonesia in order to deal with tensions in the South China Sea. Capacity building is the typical field of such cooperation. This is because the sea-lanes coming through the Malacca and Singapore Straits are lifelines for Japan to import oil from the Middle East, in addition to lawful trade in goods. In this sense, Japan is a stakeholder with an interest in freedom of navigation in the South China Sea, challenged by China’s claim of historic rights over expansive sea areas and by Beijing’s offensive activities. For this reason, Japan is expecting a code of conduct to be established by ASEAN countries in order to ensure freedom of navigation in the South China Sea. The code of conduct needs to be effective enough to make China comply with international law. In establishing the regional code of conduct for the South China Sea, the exclusion of any state should not be allowed. Non-Southeast Asian states, including the United States and Japan, are important South China Sea stakeholders due to their navigation along its sealanes. Furthermore, EU countries, too, have criticized China’s transgressing attitude toward the arbitral award rendered in 2016 and the maritime order. All of these countries are significant stakeholders with respect to the rules-based maritime order that must be preserved and defended in the East China Sea and the South China Sea. No country can remain bystanders.

At a worldwide level, Japan’s policy of “the rule of law” has been sufficiently well recognized. This

<sup>22</sup> For instance, Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia / Malaysia), Judgment of Dec. 17, 2002, *ICJ Reports 2002*, 625; Case Concerning Sovereignty over Pedra Branca / Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia / Singapore), Judgment of May 23, 2008, *ICJ Reports 2008*, 12.

<sup>23</sup> For instance, Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh / Myanmar), Judgment of March 14, 2012, *ITLOS Reports 2012*, 4.

<sup>24</sup> See note 14.

<sup>25</sup> It is not denied that non-judicial means of dispute resolution consider relevant international law rules to the disputes concerned. Nonetheless, it is not a principal function of them to declare, interpret, and apply these international law rules.

<sup>26</sup> Kanehara, “The Use of Force in Maritime Security and the Use of Arms in the Current Wide Understanding of Maritime Security,” 4-5.

forms the basis for legal and political circles created by peace-loving countries to establish and maintain the maritime order both in the East China Sea and the South China Sea. Serious rethinking of these challenging issues and advancing the rule of law in maritime Asia

are the reasons behind the *Indo-Pacific Maritime Security Expert Working Group* Workshop hosted by the Pacific Forum and YCAPS on March 23-24, 2021, through which this paper came about.



# Use of Force in International Law and the China Coast Guard Law

Nguyen Thi Lan Huong<sup>1</sup>

## Introduction

The South China Sea is one of the most important hotspots in the Indo-Pacific where major powers compete, and many nations are important stakeholders. Territorial and maritime disputes, both bilateral and multilateral, challenge regional security, stability, and development. Moreover, in this semi-enclosed sea, there is a range of non-traditional and transnational maritime threats such as piracy, terrorism, transnational organized crimes, and illegal, unreported and unregulated (IUU) fishing.

In the past few years, coastal states have increasingly invested in expanding and upgrading their maritime law enforcement agencies (MLEA) to deal with these multifaceted challenges. In the meantime, China has asserted excessive maritime claims and increased unilateral activities, such as land reclamation and the dispatch of Chinese vessels into waters of other countries, which have escalated tensions. Chinese actions have also led to serious incidents in the South China Sea. On January 22, 2021, the Standing Committee of China's National People's Congress passed a new law that gives the China Coast Guard (CCG) a more expansive set of authorities to use force. The law raised concerns among regional states and external powers regarding the maritime rules-based order vis-à-vis the East and South China Seas. This paper assesses this new Chinese law and its conformity with international law.

## Use of force in international law

The use of force against the territorial integrity or political independence of any state is prohibited in modern international law, per Article 2.4 of the United Nations Charter.<sup>2</sup> As one of the fundamental principles of international law, the principle of the non-use of force is also considered as a *jus cogens* rule.<sup>3</sup> However, the UN

Charter provides two exceptions for this principle in Articles 42 and 51, under which force may be necessarily used to maintain international peace and security. The former is related to the authority of the UN Security Council (UNSC) to take action, while the latter pertains to the right of self-defense.<sup>4</sup>

In the maritime domain, the most comprehensive treaty is the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Its preamble highlights the importance of legal order at sea and the peaceful uses of the seas and the oceans. Article 301 of UNCLOS provides for the principle of the non-use of force against the territorial integrity or independence of any state, with the same approach as in Article 2.4 of the UN Charter.<sup>5</sup>

The second aspect of the use of force in the maritime domain falls within the scope of maritime law enforcement operations. The United Nations Office on Drugs and Crime (UNODC) defines "maritime law enforcement as actions taken to enforce all applicable laws on, under and over international waters, and in waters subject to the jurisdiction of the State carrying out such enforcement activities".<sup>6</sup> When carrying out these kinds of operations, it may be necessary to use force to stop and board the suspected vessel, to search and detain the vessel and the people on board the vessel and to seize items from the vessel.<sup>7</sup> However, maritime law enforcement is a routine peacetime policing operation, not a wartime operation.

The difference between the use of force falling under Article 2.4 of the UN Charter and the use of force in maritime law enforcement must be distinguished. Therefore, the law of armed conflicts is not applicable in the case of maritime law enforcement operations. Instead, UNCLOS and other maritime laws and regulations set out legal frameworks for this peacetime policing operations.

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<sup>2</sup> Article 2.4, United Nations Charter states: "All members shall refrain in their international relations from the threat and use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." The principle of no-use of force is mentioned in the Declaration on principles of international law concerning friendly relations and cooperation among states in accordance with the Charter of the United Nations (24/10/1970). United Nations, *Charter of the United Nations*, 1945, 1 UNTS XVI, available at: <https://www.un.org/en/about-us/un-charter/full-text>, [accessed on March 28, 2021.]

<sup>3</sup> *Nicaragua v. United States*, ICJ Decision of June 27, 1986. Case concerning military and paramilitary activities in and against Nicaragua.

<sup>4</sup> Article 42, United Nations Charter: "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations." Article 51, United Nations Charter: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

<sup>5</sup> Article 301, UNCLOS 1982: "In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations."

<sup>6</sup> United Nations Office on Drugs and Crime, *Maritime Crime: A Manual for Criminal Justice practitioners*, Global Maritime Crime Programme, Part 5.1. Introduction, p.52, available at [https://www.unodc.org/documents/Maritime\\_crime/19-02087\\_Maritime\\_Crime\\_Manual\\_Second\\_Edition\\_ebook.pdf](https://www.unodc.org/documents/Maritime_crime/19-02087_Maritime_Crime_Manual_Second_Edition_ebook.pdf), accessed on May 14, 2021.

This manual also cites a series of actions in maritime law enforcements operations such as: signaling, stopping, boarding suspect vessels, searching, detaining, arresting people and cargo in suspect vessels, seizing items, directing or steaming suspect vessels, people and the cargo in those vessels to a coastal state port or similar place for investigations.

<sup>7</sup> UNODC, *Maritime Crime: A Manual for Criminal Justice practitioners*, Global Maritime Crime Programme, Part 5.1. Introduction, note 5.7, p.63, available at [https://www.unodc.org/documents/Maritime\\_crime/19-02087\\_Maritime\\_Crime\\_Manual\\_Second\\_Edition\\_ebook.pdf](https://www.unodc.org/documents/Maritime_crime/19-02087_Maritime_Crime_Manual_Second_Edition_ebook.pdf), accessed on May 14, 2021.



*International treaties*

UNCLOS serves as a legal basis to deal with all matters at sea, including maritime law enforcement. Coastal states may take necessary steps to protect their legitimate rights in their maritime zones. In certain **circumstances, states should take effective measures in the high seas**. However, UNCLOS does not mention directly or explicitly the use of force in maritime law enforcement. It only provides that states may take any necessary steps or measures to enforce laws and regulations, as shown on table 1.

Maritime law enforcement is also regulated in other international treaties in which the use of force is

explicitly mentioned. These include the 1988 Convention for the Suppression of unlawful acts against the safety of maritime navigation (SUA 1988),<sup>8</sup> the 2005 Protocol to the SUA 1988,<sup>9</sup> and the 1995 Agreement for the implementation of the provisions of the UNCLOS relating to the conservation and management of straddling fish stocks and highly migratory fish stocks.<sup>10</sup>

*Case law*

In the *MV Saiga No.2* case, the International Tribunal for the Law of the Sea (ITLOS) concluded that: Although UNCLOS does not contain expressed provisions on the use of force in the arrest of ships, international law

**Table 1. UNCLOS' provisions on maritime law enforcement**

Maritime zones	Jurisdiction	Who take actions	Source
Internal waters	Sovereignty	Coastal States	Article 8
Territorial sea	- "sovereignty"	Coastal States	Article 2
	- take the necessary steps to prevent passage which is not innocent		Article 25
	- right to take any steps authorized by its law for the purposes of arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters		Article 27 (para. 2) <sup>i</sup>
	- right to levy execution against or arrest a foreign ship lying in the territorial sea or passing		Article 28, para 3. (civil jurisdiction in relation to foreign ship) <sup>ii</sup>
Contiguous zone	exercise the control necessary to prevent and punish infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea	Coastal States	Article 33
Exclusive economic zone	may take necessary measures (boarding, inspection, arrest, judicial proceedings) to ensure compliance with the laws and regulations adopted by it in conformity with the UNCLOS.	Coastal States	Article 73
High seas	- take effective measures to prevent and punish the transport of slaves	States	Article 99
	- duty to cooperate in the repression of piracy		Article 100
	- seize pirate ship or aircraft		Article 105
	- cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substance	State having jurisdiction (para 3)	Article 108
	- arrest any person or ship engaged in unauthorized broadcasting and seize the broadcasting apparatus		Article 109
	- right of visit		Article 110
- right of hot pursuit	competent authorities of the coastal state	Article 111	
In terms of protection of the marine environment	take all measures to prevent, reduce and control pollution of the marine environment	States	Article 194 and Section 6 of Part XII

i. Article 27 UNCLOS 1982 on 'criminal jurisdiction on board a foreign ship': Before taking any steps, the coastal State shall notify a diplomatic agent or consular agent of the flag State. In case of emergency, this notification may be communicated while the measures are being taken.

ii. Article 28 UNCLOS 1982 relates to civil jurisdiction in relation to foreign ships, accordingly, the coastal State should not stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship. But the coastal State has the right to levy execution against or arrest a foreign ship lying in the territorial sea or passing through the territorial sea after leaving internal waters.

<sup>8</sup> 1988 Convention for the Suppression of unlawful acts against the safety of maritime navigation, Article 3 and Article 6, available at <https://treaties.un.org/doc/db/Terrorism/Conv8-english.pdf>, accessed on March 28, 2021. Accordingly, Article 6 of the Convention SUA 1988 stipulates each state party shall take such measure which may be necessary to establish its jurisdiction over the offences set forth in article 3.

<sup>9</sup>2005 Protocol to the Convention SUA 1988, Article 8.bis, paragraph 9, available at: <https://www.refworld.org/docid/49f58c8a2.html>, accessed on June 05, 2021. Article 8 bis, paragraph 9 of the 2005 Protocol to SUA 1988 states that: "When carrying out the authorized actions, the use of force shall be avoided except when necessary to ensure the safety of its officials and persons on board, or where the officials are obstructed in the execution of the authorized actions. Any use of force pursuant to this article shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances."

<sup>10</sup> The 1995 Agreement for the implementation of the provisions of the UNCLOS relating to the conservation and management of straddling fish stocks and highly migratory fish stocks (UNFSA 1995), available at [https://www.un.org/Depts/los/convention\\_agreements/texts/fish\\_stocks\\_agreement/CONF164\\_37.htm](https://www.un.org/Depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm), accessed on March 28, 2021. The UNFSA 1995 sets out provisions relating to maritime law enforcement to ensure compliance with the conservation and management measures in Part VI (Compliance and Enforcement). Enforcement measures include boarding, investigation, inspection, imposing penalties. Article 22 of the UNFSA 1995 provides for basic procedures for boarding and inspection pursuant to article 21, accordingly, paragraph 4 states: "The inspecting state shall 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 shall not exceed that reasonably required in the circumstances."

requires that the use of force must be avoided, 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. The Tribunal also referred to the normal practice used to stop a ship at sea mentioned in the *I'm Alone* (1929) and *Red Crusader* (1961) cases. Accordingly, the MLEA should give the appropriate warning and all efforts have to be made to ensure that life is not endangered. The MLEA should first give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the ship's bow. It is only after the appropriate actions fail that the pursuing vessel may use force as a last resort.<sup>11</sup> In the *Guyana and Suriname* case, the Arbitral Tribunal supported the same approach as in the *MV Saiga No.2* case, stating that in international law, force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary.<sup>12</sup>

### Non-binding guidelines

There are also some non-binding guidelines relating to law enforcement that could be applied in the maritime domain. For instance, the Code of Conduct for Law Enforcement Officials adopted by General Assembly resolution 24/169 of December 17, 1979 (1979 Code of Conduct)<sup>13</sup>, and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials adopted by the 8th United Nations Congress on the Prevention of the Crime and the Treatment of Offenders in Havana, Cuba, 1990 (1990 Basic Principles).<sup>14</sup> The UNODC also published guidebooks relating to the use of force in maritime law enforcement, for example the 2017 *Resource Book on the Use*

*of Force and Firearms in Law Enforcement*, and the 2019 *Maritime Crime: A Manual for Criminal Justice Practitioner*.<sup>15</sup> These guidelines set out international standards for the use of force in maritime law enforcement. Accordingly, the two permissible reasons for the use of force in the maritime domains are: First, self-defense as the only exception to the prohibition of the use of force under Article 2.4 of the UN Charter and Article 301 of UNCLOS. Second, states are allowed to take measures to enforce compliance with laws and regulations adopted by them in conformity with international law, including UNCLOS. States shall avoid the use of force except when to the degree necessary to ensure the safety of the crew. The degree of force shall not exceed that "reasonably required"<sup>16</sup> and "the minimum which is necessary and reasonable in the circumstances."<sup>17</sup>

In carrying out their duties, law enforcement officials shall, as far as possible, apply non-violent means. They can resort to the use of force and firearms only if other means remain effective or without any promise of achieving the intended result. Therefore, use of force is always the last resort. The following are the guiding principles for the lawful use of force:<sup>18</sup> (1) Legality;<sup>19</sup> (2) Necessity;<sup>20</sup> (3) Proportionality;<sup>21</sup> (4) Non-discrimination and respect of human rights;<sup>22</sup> (5) Precaution<sup>23</sup> and (6) Accountability.<sup>24</sup>

Moreover, states and law enforcement agencies "should develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms," from the employment of non-lethal incapacitating weapon, to the use of self-defensive equipment, and less extreme means.<sup>25</sup>

<sup>11</sup> 1999 Judgment, *MV Saiga* (No.2) case, note 155, 156. (In this case, based on the principles and the circumstances, the Tribunal concluded that Guinea used excessive force and endanger human life before and after boarding the Saiga, violating the rights of Saint Vincent and the Grenadines under international law.)

<sup>12</sup> *Guyana and Suriname* case Award of the Arbitral Tribunal, 2017, available from <https://pcacases.com/web/sendAttach/902>.

<sup>13</sup> General Assembly resolution 24/169, 1979 *Code of Conduct for Law Enforcement Officials*, A/RES/24/169 (17 December, 1979) available from <https://www.ohchr.org/Documents/ProfessionalInterest/codeofconduct.pdf>.

<sup>14</sup> United Nations, Eighth Congress on the Prevention of Crime and Treatment of Offenders, 1990 *Basic Principles of the Use of Force and Firearms by Law Enforcement officials* (27 August, 1990), available from: <https://www.un.org/ruleoflaw/files/BASICP~3.PDF>.

<sup>15</sup> United Nations Office on Drugs and Crime, *Resource Book on the Use of Force and Firearms in Law Enforcement*, (New York: United Nations, 2017), available from: [https://www.unodc.org/documents/justice-and-prison-reform/17-03483\\_ebook.pdf](https://www.unodc.org/documents/justice-and-prison-reform/17-03483_ebook.pdf); United Nations Office on Drugs and Crime, 2019 *Maritime Crime: A manual for Criminal Justice Practitioner* (New York: United Nations 2019), available from: [https://www.unodc.org/documents/Maritime\\_crime/19-02087\\_Maritime\\_Crime\\_Manual\\_Second\\_Edition\\_ebook.pdf](https://www.unodc.org/documents/Maritime_crime/19-02087_Maritime_Crime_Manual_Second_Edition_ebook.pdf).

<sup>16</sup> Article 22, United Nations Fisheries Stocks Agreement 1995.

<sup>17</sup> Article 8, 2005 Protocol of the SUA Convention.

<sup>18</sup> United Nations Office on Drugs and Crime and United Nations Human Rights Council, *Resource Book on the Use of Force and Firearms in Law Enforcement*, p.16, 2017, available from: [https://www.unodc.org/documents/justice-and-prison-reform/17-03483\\_ebook.pdf](https://www.unodc.org/documents/justice-and-prison-reform/17-03483_ebook.pdf).

<sup>19</sup> UNODC and UNHRC, *Resource Book on the Use of Force and Firearms in Law Enforcement*, p.16, 2017. [https://www.unodc.org/documents/justice-and-prison-reform/17-03483\\_ebook.pdf](https://www.unodc.org/documents/justice-and-prison-reform/17-03483_ebook.pdf). Principle 1, "1990 Basic Principles of the Use of Force and Firearms by Law Enforcement officials", p.1, available from: <https://www.un.org/ruleoflaw/files/BASICP~3.PDF>. "Governments and law enforcement agencies shall adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials. In developing such rules and regulations, Governments and law enforcement agencies shall keep the ethical issues associated with the use of force and firearms constantly under review."

<sup>20</sup> Article 3, 1979 *Code of Conduct for Law Enforcement Officials*. The principle of necessity is also provided in various international instruments such as the UNCLOS 1982, the UNFSA 1995, the Convention SUA 1988, the Protocol 2005 of the SUA 1988 and various non-binding guidelines. Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.

<sup>21</sup> Commentary (b) of the Article 3, 1979 *Code of Conduct for Law Enforcement Officials*, p.2. Accordingly, national laws restrict the use of force by law enforcement officials in accordance with a principle of proportionality. Reference to Principle 5 (a) of the 1990 Basic Principles for the Use of Force and Firearms by Law Enforcement officials: "Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall exercise restraint in such use and act in proportion to the seriousness of the offense and the legitimate objective to be achieved."

<sup>22</sup> Article 2 and commentary, 1979 *Code of Conduct for Law Enforcement Officials*, p.1. Accordingly, in the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.

<sup>23</sup> United Nations Office on Drugs and Crime and United Nations Human Rights Council, *Resource Book on the Use of Force and Firearms in Law Enforcement*, p.19. Read also ICRC, Advisory Service on International Humanitarian Law, *The use of force in law enforcement operations*, 2015. Law enforcement actors at all levels should take precautions to avoid or minimize the use of force.

<sup>24</sup> Principle 7, 1990 *Basic Principles of the Use of Force and Firearms by Law Enforcement officials*, p.2. Accordingly, States, law enforcement agencies and their officials should take responsibility should take responsibility for inappropriate use of force and answer to their victims.<sup>24</sup> Arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offense under their law.

<sup>25</sup> Principle 4, 1990 *Basic Principles of the Use of Force and Firearms by Law Enforcement officials*, p.1.

The use of firearms is considered an extreme measure, then applied only in strict conditions.<sup>26</sup>

### Use of force in the China Coast Guard Law

The CCG was established in 2013 within the State Oceanic Administration. Since July 2018, this service is under the administration of the People's Armed Police (PAP), which is under the direct command of the Central Military Commission. The CCG Law, consisting of 11 chapters and 84 articles, was enacted on January 21, 2021 and entered into force on February 1, 2021. In the context of recent developments in the South China Sea, Vietnam,<sup>27</sup> Indonesia,<sup>28</sup> the United States,<sup>29</sup> Japan,<sup>30</sup> Australia, and the United Kingdom<sup>31</sup> have raised concerns regarding this new law. Philippine Foreign Affairs Secretary Teodoro Locsin stated in a tweet that the new CCG legislation was "a verbal threat of war to any country that defies the law".<sup>32</sup>

It is not an uncommon practice for MLEAs to use force while exercising their functions to the extent that such use of force is reasonable and necessary under the given circumstances. Arguably, the CCG law is not the only domestic legislation that allows the use of force in maritime law enforcement. The Asia Maritime Transparency Initiative (AMTI) conducted a comparative study on the use of force in maritime law enforcement operations by various Coast Guard services in Asia. AMTI found that almost all the coastguard services examined (China, Japan, the Philippines, South Korea, the United States, Vietnam, and Taiwan) are permitted to employ weapons in defense of themselves and others, in case of stopping a fleeing vessel suspected of committing a crime or resisting boarding.<sup>33</sup> Still, the CCG law is different and these differences have provoked reactions.

First, and most importantly, this law does not clarify the geographical scope of what it terms, "waters under the jurisdiction (jurisdictional waters) of the

People's Republic of China." A draft of Article 74.2 included text defining "jurisdictional waters of the PRC" as "internal waters, territorial seas, contiguous zone, exclusive economic zone and continental shelf and other waters under the jurisdictional waters of the PRC".<sup>34</sup> However, this definition was deleted in the enacted law, therefore, the law became more ambiguous than the draft. In the meanwhile, China consistently asserts excessive and unlawful maritime claims, such as the "nine-dash lines" and its new position based on *Nanhai Zhudao* or *Four Sha* claims. In May 2009, China, for the first time, officially announced its claim in the South China Sea in a note verbale submitted to the United Nations with the ambiguous nine-dash line map attached.<sup>35</sup> On July 12, 2016, the Tribunal in the *South China Sea Arbitration* case instituted by the Philippines against China through Annex VII of UNCLOS issued a final award. The Arbitration tribunal concluded that "China's claim to historic rights to the living and non-living resources within the 'nine-dash lines' is incompatible with UNCLOS."<sup>36</sup>

On the same day of the release of the Award, China stated its four-point-position on the South China Sea: (1) China has sovereignty over *Nanhai Zhudao*, consisting of *Dongsha Qundao*, *Xisha Qundao* (Paracels), *Zhongsha Qundao* and *Nansha Qundao* (Spratlys); (2) China has internal waters, territorial sea and contiguous zone, based on *Nanhai Zhudao*; (3) China has exclusive economic zones and continental shelves, based on *Nanhai Zhudao* and (4) China has historic rights in the South China Sea.<sup>37</sup> This new legal position is also called as 'Four Sha' claim by many international scholars.<sup>38</sup> On December 12, 2019, China officially announced this new position by sending a note verbale to the United Nations Secretary-General, in response to Malaysia's partial submission to the Commission on the Limits of the Continental Shelf (CLCS) claiming extended continental shelf in the South China Sea.<sup>39</sup> China also claims that the drawing of territorial sea

<sup>26</sup> Commentary Article 3, 1979 Code of Conduct for Law Enforcement Officials, p.2. Principles 9, 10 and 11, 1990 Basic Principles of the Use of Force and Firearms by Law Enforcement officials, p.2-3.

<sup>27</sup> "Vietnam advocates rule-of-law principle on seas and oceans: Spokesperson", *Nhan Dan*, Apr. 2, 2021,

<https://en.nhandan.vn/politics/domestic/item/9568302-vietnam-advocates-rule-of-law-principle-on-seas-and-oceans-spokesperson.html>.

<sup>28</sup> "Indonesia flags unease over Beijing's South China Sea actions in comments from maritime security chief, Army Staff College," *South China Morning Post*, February 5, 2021, <https://www.scmp.com/week-asia/politics/article/3120780/indonesia-flags-unease-over-beijings-south-china-sea-actions>

<sup>29</sup> U.S. concerned China's new coast guard law could escalate maritime disputes," *Reuters*, Feb. 20, 2021, sec. Emerging Markets, <https://www.reuters.com/article/us-usa-china-coastguard-idUSKBN2AJ2GN>.

<sup>30</sup> Japan-Australia-India-US Leaders' Video Conference, March 13, 2021, available at: [https://www.mofa.go.jp/fp/nsp/page1e\\_000310.html](https://www.mofa.go.jp/fp/nsp/page1e_000310.html), accessed on May 05, 2021.

<sup>31</sup> Mari Yamaguchi, "Japan expresses concern to UK over new Chinese Coast guard law," Feb. 4, 2021 Accessed May 05, 2021.

<https://thediplomat.com/2021/02/japan-expresses-concern-to-uk-over-new-chinese-coast-guard-law/>.

<sup>32</sup> "PH protests China law allowing its coast guards to fire on foreign vessels," *CNN Philippines*, Jan. 27, 2021,

<https://www.cnnphilippines.com/news/2021/1/27/Philippines-diplomatic-protest-China-Coast-Guard-Law.html>

<sup>33</sup> Asia Maritime Transparency Initiative, "Force Majeure: China's Coast Guard Law in Context," March 30, 2021. <https://amti.csis.org/force-majeure-chinas-coast-guard-law-in-context/>.

<sup>34</sup> "NPCSC Passes Coast Guard Law, Revises Administrative Penalties Law & Animal Epidemic Prevention Law & Establishes Beijing Financial Court", *NPC Observer*, Jan. 24, 2021, <https://npcobserver.com/2021/01/24/npcsc-passes-coast-guard-law-revises-administrative-penalties-law-animal-epidemic-prevention-law-establishes-beijing-financial-court/>.

<sup>35</sup> China's note verbale, CML/17/2009, May 07, 2009, available at:

[https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/chn\\_2009re\\_mys\\_vnm\\_e.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf), accessed on June 10, 2021. This map reflects China's claim as U-line or nine dash line without explanation.

<sup>36</sup> *The Republic of the Philippines and The People's Republic of China case Award of the Arbitral Tribunal*, July 12, 2016, note 261, p.111. available from: <https://pcacases.com/web/sendAttach/2086>.

<sup>37</sup> Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea. July 12, 2016. [https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj\\_1/t1379493.htm](https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1379493.htm). Read also, China's position entitled "China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea", July 13, 2016. [https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj\\_1/t1380615.htm](https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1380615.htm).

<sup>38</sup> The Four-sha claims was unofficially introduced by Ma Xinmin, Deputy Director General of Chinese Foreign Ministry's Department of Treaty and Law, in a meeting in Boston in 2017. Julian Ku, Chris Mirasola, "The South China Sea and China's 'Four Sha' claims: A new legal theory, same bad argument," *Laufare*, Sep. 25, 2017. <https://www.lawfareblog.com/south-china-sea-and-chinas-four-sha-claim-new-legal-theory-same-bad-argument>.

<sup>39</sup> Note verbal no. CML/14/2019, Permanent Mission of the People's Republic of China to the United Nations, Dec. 12, 2019, available at [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mys85\\_2019/CML\\_14\\_2019\\_E.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/mys85_2019/CML_14_2019_E.pdf); Malaysia Partial Submission, available at [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mys85\\_2019/20171128\\_MYS\\_ES\\_DOC\\_001\\_secured.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/mys85_2019/20171128_MYS_ES_DOC_001_secured.pdf).

baselines on relevant islands and reefs in the South China Sea conforms to UNCLOS and general international law. China argues that “the long established practice in international law related to continental states’ outlying archipelagos shall be respected.”<sup>40</sup>

Ten coastal states and stakeholders submitted diplomatic notes to protest China’s excessive and unlawful claims in the South China Sea. The protesting states are the Philippines, Vietnam, Indonesia, Malaysia, the United States, Australia, France, Germany, the United Kingdom, and Japan.<sup>41</sup> The ambiguous wording of China’s jurisdictional waters/waters under China’s jurisdiction in this law raises concerns in the international community. In the South China Sea, Beijing has increased

illegal acts, criminal acts, and the perpetrators (Article 50).

- The use of police equipment and weapons shall be implemented in accordance with the provisions of the People’s Police on the use of equipment and weapons and other relevant laws and regulations (Article 51).

Accordingly, the law contains wordings such as “take any necessary measures”, “reasonable judgment”, and “necessary limits of the use of weapons” and cites different circumstances to explain the use of force. However, the vagueness of these provisions could lead to abuse and escalation. For example, Article 48 allows the CCG to use shipborne or airborne weapons in addition to hand-held weapons under three specified situations: (1)

Article	Form of force	Circumstances of use
Article 46	police equipment and other equipment (non-firearms)	- force the ship to stop - forcibly driving away/ towing the ship - obstacles or nuisances encountered - other situations where illegal and criminal acts need to be stopped
Article 47	hand-held weapons (if the warning is invalid)	- evidence that the ship is carrying criminal suspects or illegally carrying weapons (...) and refuses to obey the stopping order - when a foreign ship enters the waters under China’s jurisdiction to illegally engage in production activities, refuses to obey the stopping order and the use of other measures is not sufficient to stop.
Article 48	shipborne or airborne weapons in addition to hand-held weapons	- performing maritime anti-terrorism missions - dealing with serious incidents of violence at sea - law enforcement ships or aircraft are attacked by weapons or other dangerous methods.

its presence in the maritime domain by applying “gray zone operations” (or salami-slicing tactics), and sending Chinese fishing or militia vessels to the waters under the jurisdiction of other coastal states per the current status quo, and harassing other states’ fishing vessels or hydrocarbon operations in these waters.<sup>42</sup>

The second reason that the CCG law is concerning is because it stipulates controversial and worrisome provisions relating to the use of force which could serve as a legal basis for China to attack and target other claimants’ vessels in the East and the South China Seas.<sup>43</sup> Chapter 6 (Article 46 to Article 51) contains six provisions relating to the use of force in maritime law enforcement operations. Accordingly, depending on specified circumstances, the CCG may use a range of means of force, such as police equipment, hand-held weapons, and shipborne or airborne weapons, as summarized in the table 2.<sup>44</sup>

Under the new law:

- The CCG may use weapons if it is too late to warn or if the warning may cause some serious harmful consequences (Article 49).
- The CCG staff shall make reasonable judgment on the necessary limits of the use of weapons and try to avoid or reduce unnecessary casualties and property losses, based on the nature, degree and urgency of the

while performing maritime anti-terrorism missions, (2) dealing with serious incidents of violence at sea, and (3) while the CCG ships or aircraft are attacked by weapons or other dangerous methods. However, this framing begs important questions: Is the use of shipborne and airborne weapons a necessary and reasonable measure to deal with these circumstances? Does the use of these weapons ensure the principle of proportionality? How do we assess what is a “serious incident of violence at sea”?

Provisions in Chapter 3 of the CCG Law on Maritime Security also raise concerns and potentially violate international law. Article 20 authorizes the CCG to order foreign organizations and individuals to stop or force the construction of buildings, structures, and installations in the areas under China’s jurisdiction. The law gives CCG the right to stop or force the demolition of these structures if the foreign agents refuse to stop or do not demolish their creations. This article could threaten Malaysia, the Philippines, and Vietnam, who all occupy outposts in the South China Sea. Article 21 allows the CCG to take necessary warnings and control measures to stop foreign military and government ships used for non-commercial purposes that violate China’s laws and regulations in the waters under China’s jurisdiction and order them to leave immediately. According to Article 46, the CCG may use police equipment, or other equipment

<sup>40</sup> Note verbale no. CML/63/2020, Permanent Mission of the People’s Republic of China to the United Nations, Sep. 18, 2020 available at: [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mys\\_12\\_12\\_2019/2020\\_09\\_18\\_CHN\\_NV\\_UN\\_009\\_e.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_09_18_CHN_NV_UN_009_e.pdf).

<sup>41</sup> List of diplomatic notes, Submissions to the Commission: Partial Submission by Malaysia in the South China Sea, available at: [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/submission\\_mys\\_12\\_12\\_2019.html](https://www.un.org/Depts/los/clcs_new/submissions_files/submission_mys_12_12_2019.html).

<sup>42</sup> Michael R. Pompeo, Secretary of State, Press Statement ‘U.S. Position on Maritime Claims in the South China Sea’, July 13, 2020, available at <https://asean.usmission.gov/u-s-position-on-maritime-claims-in-the-south-china-sea/>.

<sup>43</sup> “China’s Coast guard can fire on foreign vessels, complicating security in South Sea,” VOA News, Feb. 2021.

<sup>44</sup> “NPCSC Passes Coast Guard Law, Revises Administrative Penalties Law & Animal Epidemic Prevention Law & Establishes Beijing Financial Court”, NPSC Observer, Jan 24, 2021. <https://npcobserver.com/2021/01/24/npcsc-passes-coast-guard-law-revises-administrative-penalties-law-animal-epidemic-prevention-law-establishes-beijing-financial-court/> and Julian Ku, Chris Mirasola, “The South China Sea and China’s ‘Four Sha’ claims: A new legal theory, same bad argument,” Lawfare, Sep. 25, 2017. <https://www.lawfareblog.com/south-china-sea-and-chinas-four-sha-claim-new-legal-theory-same-bad-argument>

and tools, on the spot when it is necessary to force to stop, drive away, or tow the ship. These provisions potentially violate rules applicable to warships and other government ships as provided in UNCLOS. Article 22 authorizes the CCG to use all necessary measures, including weapons, to stop the infringement and eliminate danger when national sovereignty, sovereign rights, and jurisdiction are being illegally infringed by foreign organizations and individuals at sea. In case of infringement, Chapter 6 of the CCG law on the use of force would be applied. This article could serve as a legal basis for the CCG to take coercive measures against normal activities by other states in their own EEZ and continental shelf that are inside the nine-dash lines, such as fishery and hydrocarbon operations.

Article 25 of Chapter 4 is a questionable provision because it allows the CCG to delimit temporary maritime security zones in the waters under China's jurisdiction to restrict and prohibit the passage or stay of ships and personnel. It is noted that the geographical scope of "waters under China's jurisdiction" should be clarified, if not, this provision could violate other neighboring states' legitimate rights and entitlements, and undermine freedom of navigation rules under UNCLOS.<sup>45</sup> These vague provisions are the reasons behind why many states criticize and feel insecure about the passage of the CCG law.

## Conclusion

Over the past decades, various international standards have defined a set of parameters and boundaries of law enforcement operations, including those in the maritime domain. In principle, the prohibition of the use of force is one of the fundamental principles of international law. In the maritime domain, there are two exceptions to this prohibition: (i) in case of self-defense and (ii) in case of maritime law operations. It should be highlighted that the use of force in maritime law operations shall be avoided and only used when strictly necessary and to the extent required for the performance of their duty, in accordance with international law, especially UNCLOS and the guiding principles of the use of force and firearms.

In the South China Sea, competing territorial and maritime disputes are exceptionally complex issues that

stand beside a range of transnational challenges such as piracy, climate change, and IUU fishing. Therefore, over the past years, coastal states in the South China Sea have adopted national legislation and regulations, and established their own MLEA to protect their maritime interests. Lyle Morris argues in his research that now is the era of coast guards in the region. Coast guards are the new asset of choice for many states in Northeast and Southeast Asia to assert sovereignty over disputed waters.<sup>46</sup> The MLEA can therefore be expected to play important roles as the first responders and frontline actors in addressing various maritime challenges.<sup>47</sup> However, many major incidents in the South China Sea have been caused by China's coercive activities which have escalated tensions and undermined regional peace and security.<sup>48</sup> China consistently asserts excessive and unlawful territorial and maritime claims while conducting gray zone operations by mobilizing the CCG and maritime militia vessels to waters under other states' jurisdiction per UNCLOS. Chinese government vessels take coercive measures such as harassing and sinking fishing boats that are exercising normal activities. China's unilateral activities and the pattern of serious incidents in the South China Sea concern coastal states and extra-regional stakeholders.<sup>49</sup> ASEAN, on many occasions, emphasized the importance of non-militarization and self-restraint as in the Declaration on the Conduct of Parties in the South China Sea (DOC) in 2002.<sup>50</sup>

Beijing has insisted that the new law is consistent with international conventions and the practice of various nations and that it does not target any specific country.<sup>51</sup>

**"Beijing has insisted that the new law is consistent with international conventions... But given China's empirical track record, this law is provoking growing anxiety in the international community about China's assertiveness and its future plans... Many ambiguous provisions in the law could blur the line between threat or use of force against the territorial integrity of any state as wartime operations and the use of force in maritime law**

Some Chinese experts argue that the CCG law represents an integral step towards clarifying and standardizing the CCG operations and could facilitate greater maritime law

<sup>45</sup> Raul (Pete) Pedrozo, "Maritime Police Law of the People's Republic of China," *International Law Studies*, 97 (2021), available at: <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=2960&context=ils>.

<sup>46</sup> Lyle Morris, "The era of coast guards in the Asia-Pacific is upon us." Asia Maritime Transparency Initiative, March 8, 2017. <https://amti.csis.org/era-coast-guards-asia-pacific-upon-us/>. Read also, Lyle Morris, "Blunt Defenders of Sovereignty - The rise of Coast Guards in East and Southeast Asia," *Naval War College Review* 70 No. 2 (Spring, 2017). <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1016&context=nwc-review>.

<sup>47</sup> Co-chairs' Summary Report, ASEAN Regional Forum (ARF) Workshop on enhancing regional maritime law enforcement cooperation, Nha Trang, Vietnam, Jan. 18-19, 2018, available from: <https://aseanregionalforum.asean.org/wp-content/uploads/2019/10/FINAL-Co-chairs-Summary-Report-ARF-Workshop-on-Enhancing-Regiona.pdf>.

<sup>48</sup> ChinaPower, "Are Maritime Law Enforcement Forces Destabilizing Asia?," August 18, 2016. <https://chinapower.csis.org/maritime-forces-destabilizing-asia/>.

<sup>49</sup> E3 joint statement on the situation in the South China Sea (France, Germany and the United Kingdom), August 29, 2019, available at <https://www.gov.uk/government/news/e3-joint-statement-on-the-situation-in-the-south-china-sea>. Read also: US Department of State, PRC's Reported Sinking of a Vietnamese Fishing Vessel in the South China Sea, April 06, 2020, available at: <https://vn.usembassy.gov/prcs-reported-sinking-of-a-vietnamese-fishing-vessel-in-the-south-china-sea/>. These statements protested China's activities in the South China Sea.

<sup>50</sup> Joint Communiqué of the 52nd ASEAN Foreign Ministers' meeting (Bangkok, July 31, 2019), available at: <https://asean.org/storage/2019/07/CIRCULATE-Joint-Communique-of-the-52nd-AMM-FINAL.pdf>.

<sup>51</sup> Mo Jingxi, "Coast guard law is routine, doesn't target any specific country," *China Daily*, Mar. 07, 2021.: <https://global.chinadaily.com.cn/a/202103/07/WS6044b8b5a31024ad0baad68a.html>.

enforcement cooperation.<sup>52</sup> But given China's empirical track record, this law is provoking growing anxiety in the international community about China's assertiveness and its future plans. Moreover, Article 83 of this law clarifies the dual functions of the CCG, both in maritime law enforcement and in defense operations. Many ambiguous provisions in the law could blur the line between threat or use of force against the territorial integrity of any state as wartime operations and the use of force in maritime law enforcement as peacetime operations.

Passing national legislations is routine. However, as part of the international community, countries are obliged to comply with international laws and international treaties when they issue and implement national legal documents relating to the seas.<sup>53</sup> In a press

briefing, the Chinese Ministry of Foreign Affairs' Hua Chunying explained that China would continue to work with relevant countries to properly resolve contradictions and differences through dialogue and consultation.<sup>54</sup> The idea sounds great, but transparency must be required. China could share its viewpoint and resolve the ambiguity of the CCG law by giving a precise definition of China's jurisdictional waters to the international community. Any maritime claim must be in accordance with international law. China must adhere to UNCLOS because it is universally recognized as the basis for determining maritime entitlements, sovereign rights, jurisdiction and legitimate interests over maritime zones and sets out the legal framework within which all activities in the oceans and seas must be carried out.<sup>55</sup>

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<sup>52</sup> Shuxian Luo, "China's Coast Guard Law: Destabilizing or Reassuring?," *The Diplomat*, Jan. 29, 2021. <https://thediplomat.com/2021/01/chinas-coast-guard-law-destabilizing-or-reassuring/>. and Zong Haiyi, "China's Coast Guard Law unlocks new chapter of maritime legal enforcement cooperation," *Global Times*, Mar. 27, 2021. <https://www.globaltimes.cn/page/202103/1219578.shtml>.

<sup>53</sup> "Vietnam advocates rule-of-law principle on seas and oceans: Spokesperson", *Nahn Dan* agency, Apr. 2, 2021. <https://en.nhandan.vn/politics/domestic/item/9568302-vietnam-advocates-rule-of-law-principle-on-seas-and-oceans-spokesperson.html>. This is also Vietnam's position on the passage of the CCG law, given by Vietnam's Ministry of Foreign Affairs spokeswoman.

<sup>54</sup> "Beijing Finalizes New Use-of-Force Rules for China Coast Guard," *Maritime Executive*, Jan. 25, 2021. <https://www.maritime-executive.com/article/beijing-finalizes-new-use-of-force-rules-for-china-coast-guard>.

<sup>55</sup> Chairman's Statement on the 36th ASEAN Summit, Cohesive and Responsive ASEAN, June 26, 2020, available at: <https://asean.org/storage/2020/06/Chairman-Statement-of-the-36th-ASEAN-Summit-FINAL.pdf>, accessed on March 20, 2021.



# Are we ready for the Quad?

## Two contradictory goals

Kyoko Hatakeyama<sup>1</sup>

### Introduction

Since the 2010s, China's assertiveness in the maritime domain has been of concern to regional states. China has unilaterally claimed what it considers its historic rights in the South China Sea and installed military bases on reclaimed features there. China's unilateral claims and its associated behavior thus changed the status quo by force and have increased tensions with Southeast Asian littoral states, such as the Philippines and Vietnam, which are also claimants. Under these circumstances, the Quadrilateral Security Dialogue (Quad) involving the United States, Japan, Australia, and India was revived in November 2017.

Following a series of Cabinet-level meetings, the Quad was upgraded to a Head of State-level summit in March 2021. At that meeting, the four nations confirmed the importance of the rule of law and agreed to cooperate in various fields. For instance, they agreed to launch the Quad vaccine partnership which will deliver up to a billion doses of Indian-made coronavirus vaccine to Southeast Asia and potentially elsewhere by the end of 2022. They also agreed to accelerate cooperation to address climate change by launching the Quad Climate Working Group. In short, the four nations demonstrated their intent to cooperate to contribute to the public good. However, in their joint statement, they neither directly criticized China nor agreed to initiate new security cooperation. Although holding the summit meeting was a major step forward, the future of the Quad remains uncertain.

Looking back, the development of the Quad has not been smooth. The Quad first met in 2007 after a proposal from Prime Minister Abe. At this working-level meeting, Quad members and Singapore agreed to participate in the next iteration of Malabar, the annual exercise that was originally a U.S.-India bilateral event. However, the Quad meeting and the multilateral Malabar exercises elicited displeasure from China. The Quad appeared to herald an Asian NATO or a multilateral institution designed to target China. The then-newly-elected Kevin Rudd government in Canberra announced that it would not seek to participate in the Quad in January 2008. India also assured China that it had no intention of excluding China when the leaders of both countries met. The United States also appeared reluctant to press on. The "China threat" thesis had yet to find consensus. Moreover, in September 2007, Abe, the Quad's biggest cheerleader, stepped down due to health reasons. The idea of having regular meetings was quietly shelved. Although it was revived in November 2017 in the face of China's growing assertiveness in the maritime domain, its evolution has been slow due to the member states' persistent cautious approach.

This paper analyzes the factors hindering the evolution of the Quad. By analyzing the interests of each

member state and the goals of the Quad, it examines why the Quad has experienced a slow development. It argues that the differences in views and interests of the Quad states hinder its evolution. Even more importantly, the Quad embraces two contradictory goals, which makes it difficult to develop a framework for cooperation and set clear purpose. The paper concludes with policy recommendations.

### Interests of each state

#### *Japan: Activist but cautious*

Concerned with China's "gray zone" activities in the East and South China Seas, Japan tried to promote cooperation among democratic states by announcing the "Arc of Freedom and Prosperity" thesis in 2006. The goal of the thesis was to promote cooperation among democracies, including India. It also introduced the concept of Indo-Pacific to emphasize India's inclusion and importance as a partner. The following year, Quad 1.0 took place but was not held again due to the lack of momentum among member states.

Meanwhile, China's extrajudicial territorial and maritime claims started to cause tensions. The frequency of China's intrusions into the contiguous or territorial waters surrounding the Japanese-administered Senkaku Islands increased. Concerned with China's assertiveness, Abe emphasized three sustaining principles at the 13th Asia Security Summit (Shangri-La Dialogue) in 2014: "The first principle is that states shall make and clarify their claims based on international law. The second is that states shall not use force or coercion in trying to drive their claims. The third principle is that states shall seek to settle disputes by peaceful means."<sup>2</sup> Then, at the Sixth Tokyo International Conference on African Development in Nairobi in 2016, Abe announced the Free and Open Indo-Pacific (FOIP) concept, which was a culmination of its determination to support the regional order based on the rule of law. The next year, the Quad was revived. This renewed series is sometimes called Quad 2.0.

Quad 2.0 was a suitable vehicle for Japan to respond to China's gray zone activities not only in the South China Sea but also in the East China Sea. By using Quad 2.0, Japan intends to put pressure on China and prevent the emergence of a power-based order. However, while Japan has been an active promoter of the Quad, it has also tried to maintain a good relationship with China. For instance, Abe visited China in 2018 to improve the relationship, the first such visit by a Japanese prime minister in seven years. He then planned to invite President Xi Jinping as a state guest despite rising international concerns about what was perceived as China's human rights abuses in Xinjian and attempts to crack down on democracy in Hong Kong. Both sides began work on the fifth joint statement, which was

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<sup>2</sup> Ministry of Foreign Affairs of Japan, "The 13th IISS Asian Security Summit – The Shangri-La Dialogue: Keynote Address by Shinzo Abe," May 30, 2014. [https://www.mofa.go.jp/fp/nsp/page4e\\_000086.html](https://www.mofa.go.jp/fp/nsp/page4e_000086.html)

to be issued on the occasion of the visit.<sup>3</sup> However, this reciprocal visit was postponed due to the Covid-19 pandemic and China's introduction of new security legislation on Hong Kong.<sup>4</sup>

Japan's tactical moves were made not only because China lies next door. Economic considerations also came to the fore. Since the 2000s, China has been Japan's largest trading partner. The growing economic relationship of the two states and the increase of Japanese investment in China had created a robust supply chain that has China at its center. Japan's quiet efforts indicated its desire to separate politics from economics.

Abe's FOIP announcement attracted attention with many analysts describing it as a countermeasure aiming to balance China's Belt and Road Initiative (BRI). However, Japan's FOIP concept does not intend to exclude China as it could be integrated into the FOIP so long as it respects the rule of law. This is aptly illustrated by Abe's 2017 speech "Asia's Dream: Linking the Pacific and Eurasia," in which he stated that Japan was ready to cooperate with China for the promotion of the BRI as long as its rules and principles were transparent and fair and the planned projects were economically viable and adequately financed.<sup>5</sup>

Due to China's growing assertiveness, which is symbolized by the 2021 adoption of its new Coast Guard Law that allows the use of force against foreign ships, Japan has become more ardent about strengthening its relationship with the United States. At their summit meeting in April 2021, Japan and the United States criticized China for its behavior and expressed strong concerns about developments in Taiwan. Notably, this was only the second time that the two countries referred to Taiwan's peace and stability since 1969. The allies also agreed to establish a supply chain for semiconductor production that would not depend on China and at the same time promote collaboration in advancing cutting-edge technology such as AI and 5G. However, this does not indicate that Japan is ready to squarely confront China. In contrast to other countries in G7, Japan has avoided imposing sanctions on Chinese officials over alleged human rights abuses of Muslim Uighurs. The FOIP's emphasis on economic prosperity illustrates Japan's traditional policy of separating politics from economics. In brief, Japan hopes to limit China's actions without squarely confronting the country.

### ***Australia: From reluctant to active player***

Australia has emphasized the importance of a rules-based order since the 2010s, repeatedly in various defense and foreign White Papers. However, Canberra for most

part had been divided over its approach toward Beijing because of China's emergence as Australia's largest trading partner, accounting for 33% of exports as of 2018.<sup>6</sup> Furthermore, Australia's close economic relationship with China has not been confined to trade. Chinese students make up 28% of foreign students enrolled in Australian universities, a portion that ranks ahead of any other sending nation.<sup>7</sup> Similarly, China is the largest contributor to the Australian tourism sector. In 2019, about 1.3 million Chinese tourists spent \$12.4 billion while in Australia.<sup>8</sup> With these factors in mind, Australia adopted a balanced behavior by emphasizing the importance of maintaining good relations with China while stressing the rules-based order in the region. The economic benefits the country derived from China encouraged Australia to maintain "strategic ambiguity" by also separating politics from economics.<sup>9</sup>

However, late in the 2010s, high profile cases of Chinese intervention in Australian domestic politics and an espionage incident triggered a shift in strategic perspective.<sup>10</sup> Australia became more concerned with growing Chinese influence in the domestic political scene.<sup>11</sup> In particular, concerns over national security led Australia to ban Huawei and ZTE from participating in the roll-out of 5G networks in 2018.<sup>12</sup> In the same year, the Australian government also passed the Foreign Interference Law and tightened Foreign Investment Review Board procedures to make it difficult for China to acquire strategic assets in Australia.

On the international front, Australia also became concerned with China's growing influence in the South Pacific, which Canberra regards as its backyard. Noticing Chinese advances in the South Pacific, Australia redoubled its efforts to strengthen relationships with the Pacific nations by announcing the Pacific Step-up Initiative in 2016. This aimed to deepen Australia's engagement with these nations through the provision of economic support. Australia's provision of an undersea telecommunications cable to Papua New Guinea and the Solomon Islands in July 2018 demonstrated its determination to counter China's creeping influence in the South Pacific.

Australia's 2020 call for an investigation of the origin of Covid-19 sparked a furious response from China. Specifically, China imposed anti-dumping and anti-subsidy duties on Australian barley in May 2020. Australian meat and wine were also targeted. In December 2020, Australia introduced a new Foreign Relations Bill (State and Territory Arrangements) to give the federal government veto power over state and local agreements with foreign entities.<sup>13</sup> This law allowed the Australian government to cancel the BRI agreements concluded in

<sup>3</sup> *Asahi Shimbun*, January 15, 2020. The first statement was issued in 1972 when Japan normalized its relationship with China. The second, third, and fourth statements were issued in 1978, 1998, and 2008, respectively.

<sup>4</sup> *Asahi Shimbun*, July 8, 2020.

<sup>5</sup> Japanese Cabinet Office, "Asia's Dream: Linking the Pacific and Eurasia," Speech by Prime Minister Shinzo Abe at the Banquet of the 23rd International Conference on "The Future of Asia," June 5, 2017.

<sup>6</sup> Australian Government, Department of Foreign Affairs and Trade, "Trade and investment at a glance 2020." <https://www.dfat.gov.au/publications/trade-and-investment/trade-and-investment-glance-2020#exports>

<sup>7</sup> Australian Government, Department of Education, Skills and Employment, "International Education, Student Numbers." <https://internationaleducation.gov.au/research/datavisualisations/Pages/Student-number.aspx>

<sup>8</sup> Budget Direct, "Australian Tourism Statistics 2020."

<https://www.budgetdirect.com.au/travel-insurance/research/tourism-statistics.html>

<sup>9</sup> Australian Government, Department of Foreign Affairs and Trade, "2017 Foreign Policy White Paper," pp. 46-47. <https://www.dfat.gov.au/sites/default/files/2017-foreign-policy-white-paper.pdf>

<sup>10</sup> Revelations of several Australian politicians accepting money from organizations and individuals connected to the Chinese Communist Party.

<sup>11</sup> Sam Dastyari "Australian senator to quit after China scrutiny," December 12, 2017. <https://www.bbc.com/news/world-australia-42318774>

<sup>12</sup> BBC, "Huawei and ZTE handed 5G network ban in Australia," August 23, 2018.

<https://www.bbc.com/news/technology-45281495>

<sup>13</sup> Parliament of Australia, Australia's Foreign Relations (State and Territory Arrangements) Bill 2020.

[https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bId=r6596](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6596)

2018 and 2019 between the Victoria government and China.<sup>14</sup>

While relations with China continued to worsen, Australia strongly supported the Quad. It also deepened its bilateral security ties with Japan. Hitherto, Australia's relationship with Japan had centered on economic issues. Although the 2007 Joint Declaration on Security Cooperation was a small step, the two countries' security relationship did not deepen in a straightforward manner. However, both states agreed in principle to conclude a Reciprocal Access Agreement in 2021. This agreement with Japan was remarkable since it would set a legal framework to enable reciprocal visits of either state's armed forces for training and operations. This means Australia would become the first country after the United States whose armed forces would be allowed to visit Japanese soil without case-by-case invitations.<sup>15</sup> Australia's emphasis on rules-based order was thus substantiated by its deepening relations with Japan.

### **India: The weakest link**

India has traditionally pursued multi-dimensional diplomacy and maintained strategic autonomy without having an ally bound to defend it in case of aggression. Although the border disputes with China have become increasingly intense recently, the potential cost inflicted by a fragile relationship with China led India to refrain from taking bold actions that would provoke Chinese retaliation.<sup>16</sup> Likewise, India was not eager to develop Quad 1.0, a group that may be regarded as having a sole purpose of countering China. India's multi-directional stance is well illustrated by its 2017 entry into the Shanghai Cooperation Organization founded by China, Kazakhstan, Kyrgyzstan, Russia, Tajikistan, and Uzbekistan.

After Quad 2.0 was relaunched, India's strategic approach remained much the same. While participating in Quad 2.0 and demonstrating its strong support for a rules-based order, India emphasized the inclusiveness of the region, which meant engagement with China. India also highlighted the centrality of ASEAN to any ordering and decision-making in the Indo-Pacific.<sup>17</sup> Therefore, India was hesitant to upgrade the Quad above the working level.<sup>18</sup> India's omnidirectional stance was also illustrated by its participation in the India-Russia-China leaders' meeting. This grouping was envisioned as a counterbalance to U.S.-led alliances in the late 1990s under a Russian initiative. It had the first foreign minister-level meeting in 2001 and upgraded to the summit level in 2006. Although the subsequent summit meeting did not take

place, in 2018, India took initiatives to revive the group after a 12 years hiatus.<sup>19</sup> India's refusal to invite Australia to the Malabar exercises also showed its desire to improve relations with China even following the 2017 Doklam incident.<sup>20</sup> Prime Minister Modi's argument made in his 2018 Shangri-La Dialogue keynote speech clearly showed this point: "India does not see the Indo-Pacific region as a strategy or as a club of limited members."<sup>21</sup>

However, growing Chinese influence in the Indian Ocean as well as India's traditional sphere of influence, which includes Sri Lanka, Nepal, and the Maldives, raised Indian anxiety and fears. Moreover, the fatal military confrontations in the Himalayas in 2020, a series of events that occurred despite the 1996 agreement that prohibited the use of weapons and explosives near the border, heightened India's concerns. As a result, India became more inclined toward the Quad. Its invitation to Australia for participation in the 2020 Malabar exercise symbolized this slight shift.

### **The United States: Becoming a more proactive leader**

When Abe proposed the Quad in 2007, the Bush Administration, preoccupied with the war on terror, was not enthusiastic about embracing this framework.<sup>22</sup> Nor was the succeeding Obama Administration. Rather, the Obama Administration first pursued engagement with China, hoping that the country would become a partner in dealing with global challenges such as climate change and terrorism. However, the United States gradually shifted its political stance, taking tougher attitudes towards China while hoping to stay engaged. The shift is well illustrated by the remarks made by Secretary of State Hilary Clinton when she emphasized American vital interest in "freedom of navigation, open access to Asia's maritime commons, and respect for international law in the South China Sea."<sup>23</sup>

The Trump Administration started a trade war with China by imposing tariffs, and called Beijing a "revisionist" and adversarial power, which aimed to "reorder the region in its favor."<sup>24</sup> Although the Trump Administration's "America First" policy raised concerns among the allies as to whether the United States would continue to play a leadership role, Washington championed FOIP by highlighting the need to bolster a rules-based order in cooperation with like-minded

<sup>14</sup> Jamie Smyth, Christian Shepherd, and Thomas Hale, "China berates Australia for cancelling Victoria BRI projects," *Financial Times*, April 22, 2021. <https://www.ft.com/content/f2c9a79f-da04-4f84-aacf-01a0d059cfac>

<sup>15</sup> Japan and the U.K. conducted their first-ever army exercises in September 2018. However, they do not have a permanent framework to enable such joint trainings. *Nikkei Shimbun*, September 14, 2018.

<sup>16</sup> Lavina Lee, "Assessing the Quad: Prospects and Limitations of Quadrilateral Cooperation for Advancing Australia's Interests," *Lowy Institute for International Policy* (2020) p. 13.

<sup>17</sup> For example, see Government of India, Ministry of External Affairs, "Prime Minister's Keynote Address at Shangri-La Dialogue," June 1, 2018. <https://www.mea.gov.in/Speeches-Statements.htm?dtl/29943/Prime+Ministers+Keynote+Address+at+Shangri+La+Dialogue+June+01+2018>

<sup>18</sup> Suhasini-Haidar, "Quad to meet next week in Singapore," November 12, 2018. <https://www.thehindu.com/news/international/quad-to-meet-next-week-in-singapore/article25473104.ece>

<sup>19</sup> Rajeswari Pillai Rajagopalan, "Russia-India-China Trilateral Grouping: More Than Hype?" July 5, 2019. <https://thediplomat.com/2019/07/russia-india-china-trilateral-grouping-more-than-hype/>; Frank O'Donnell, Mihaela Papa, "India's multi-alignment management and the Russia-India-China (RIC) triangle," *International Affairs*, Vol 97, No 3, 2021. pp. 801–822.

<sup>20</sup> Lavina Lee, "Assessing the Quad" (2020) p. 15. The Doklam incident is a China-India military border standoff.

<sup>21</sup> Government of India, Ministry of External Affairs, "Prime Minister's Keynote Address at Shangri-La Dialogue," June 1, 2018. <https://www.mea.gov.in/Speeches-Statements.htm?dtl/29943/Prime+Ministers+Keynote+Address+at+Shangri+La+Dialogue+June+01+2018>

<sup>22</sup> Daniel Flitton, "Who really killed the Quad 1.0?," June 2, 2020.

<https://www.lowyinstitute.org/the-interpretor/who-really-killed-quad-10>

<sup>23</sup> U.S. Department of State, "Remarks at Press Availability. Hillary Rodham Clinton, Secretary of State, National Convention Center Hanoi, Vietnam," July 23, 2010.

<https://2009-2017.state.gov/secretary/20092013clinton/rm/2010/07/145095.htm>

<sup>24</sup> U.S. Department of Defense, "Summary of the 2018 National Defense Strategy." <https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf>

states.<sup>25</sup> The Quad became a vehicle for the United States to put pressure on China.<sup>26</sup>

The Biden Administration is following the same path and keen to formalize the Quad as a platform for promoting cooperation and coordination among the four large democracies. The administration's decision to withdraw troops from Afghanistan indicates that the United States is ready to shift focus to Asia by reducing its burden in the Middle East. Due to China's assertiveness, maintaining peace and stability in Asia has become one of the top priorities for the U.S. strategy. The administration's emphasis on cooperation with the allies has made the Quad a convenient platform for showing unity among democracies and like-minded partners in order to contain an increasingly assertive China.<sup>27</sup>

### The goals of the Quad

In 2017, the Quad was revived by initiatives taken by the United States and Japan. Driving this revival was growing concern among states about China's assertiveness in the maritime domain. China's incursions into the contiguous and territorial waters off the Senkaku Islands increased in frequency. At the same time, China continued to expand its military presence in the South China Sea by reclaiming land and developing military bases. In 2016, China rejected an arbitral tribunal's award that found Beijing's claim in the South China Sea to be without basis under

international law. China's rejection of the award signaled an intention to challenge the post-war liberal order. In the wake of these events, a series of Quad working-level

meetings bore fruit in the form of a Malabar exercise conducted by the four nations in November 2020. The exercise indicated growing unity of the Quad in promoting defense cooperation. The March 2021 Quad summit was also followed by naval exercises by the four states and France.<sup>28</sup>

While the Quad is evolving, its purpose has not been specified. The members have deliberately maintained strategic ambiguity to dilute any confrontational element due to differing concerns and interests. Emphasis and wordings in the announcements made by each state after the meetings differed slightly. India emphasized "inclusivity of the region" while Japan and the United States have not. Nevertheless, Quad members agree in principle to uphold a rules-based order. For instance, in

2017, the Japanese Ministry of Foreign Affairs stated that the Quad "discussed measures to ensure a free and open international order based on the rule of law in the Indo-Pacific."<sup>29</sup> The goals stated here are consistent with the argument of Japan's FOIP, which also emphasized the rule of law. Indian Ministry of External Affairs stated that "a free, open, prosperous and inclusive Indo-Pacific region serves the long-term interests of all countries in the region and of the world at large."<sup>30</sup> Australia also emphasized a rules-based order. The importance of the rule of law was again confirmed at the summit level in 2021, where member states strongly agreed to uphold the principle of the rule of law and opposed China's attempts to change the status quo by force or coercion. That is, the Quad is a framework for ensuring the principle of law and checking China's moves. However, two factors subtly operate as obstacles to deepening the framework.

First, both "rules-based order" and "the rule of law" are ambiguous terms. They do not indicate uniform interpretations of existing rules and norms. They also do not specify what responses are acceptable and what are not. Although UNCLOS provides standards of behavior, it can be open to interpretation; the nature of international law allows states to interpret it on an ad-hoc basis. This enables China to justify its claims or at least present its behavior as lawful.

Second, and more importantly, while the implicitly agreed purpose of the Quad is to contain China, the four nations also aim to maintain a prosperous region underpinned by the rule of law. This is well illustrated by the U.S. statement at the 2021 summit meeting, where it stated that the United States seeks to:

*"uphold peace and prosperity and strengthen democratic resilience based on universal values. We commit to promoting a free, open rules-based order rooted in international law to advance security and prosperity and counter threats to both in the Indo-Pacific and beyond."*<sup>31</sup>

Japan's FOIP, which was welcomed by many states, similarly emphasizes a prosperous and peaceful region. This goal cannot be easily achieved without the inclusion of China's massive economy.

Since its accession to the World Trade Organization, China has become an important trading and investment partner for most states in the region. While U.S. exports to China accounted for only 7.7% of its total exports in 2019, China is the largest trading partner of Japan and of many other Asian states. Not only ASEAN but also Japan, the

### Emphasis and wordings in the announcements made by each state after the meetings differed slightly. India emphasized "inclusivity of the region" while Japan and the United States have not. Nevertheless, Quad members agree in principle to uphold a rules-based order.

<sup>25</sup> Derek Grossman, "Quad Supports U.S. Goal to Preserve Rules-Based Order,"

[https://www.realcleardefense.com/articles/2019/02/07/quad\\_supports\\_us\\_goal\\_to\\_preserve\\_rules-based\\_order\\_114169.html](https://www.realcleardefense.com/articles/2019/02/07/quad_supports_us_goal_to_preserve_rules-based_order_114169.html)

<sup>26</sup> U.S. Department of State, Public Affairs, Secretary Michael R. Pompeo at the Heritage Foundation President's Club Meeting: "Trump Administration Diplomacy: The Untold Story," October 22, 2019.

<https://2017-2021-translations.state.gov/2019/10/22/secretary-michael-r-pompeo-at-the-heritage-foundation-presidents-club-meeting-trump-administration-diplomacy-the-untold-story/index.html>

<sup>27</sup> Derek Grossman, "How the U.S. is Thinking about the Quad," February 7, 2019. <https://www.rand.org/blog/2019/02/how-the-us-is-thinking-about-the-quad.html>

<sup>28</sup> It was not a Quad event. France invited the member states to a joint exercise. "Japan, Other "Quad" Members, France Start Joint Naval Drills," nippon.com, Apr 5, 2021. <https://www.nippon.com/en/news/yj2021040500683/>

<sup>29</sup> Ministry of Foreign Affairs of Japan, "Australia-India-Japan-U.S. Consultations on the Indo-Pacific," November 12, 2017.

[https://www.mofa.go.jp/press/release/press4e\\_001789.html](https://www.mofa.go.jp/press/release/press4e_001789.html)

<sup>30</sup> Government of India, Ministry of External Affairs, "India-Australia-Japan-U.S. Consultations on Indo-Pacific," November 12, 2017.

[https://mea.gov.in/press-releases.htm?dtl/29110/IndiaAustraliaJapanUS\\_Consultations\\_on\\_IndoPacific\\_November\\_12\\_2017](https://mea.gov.in/press-releases.htm?dtl/29110/IndiaAustraliaJapanUS_Consultations_on_IndoPacific_November_12_2017)

<sup>31</sup> The White House, "Quad Leaders' Joint Statement: 'The Spirit of the Quad'," March 12, 2021. <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/12/quad-leaders-joint-statement-the-spirit-of-the-quad/>

United States and Australia look to China to spur their economies. Moreover, China is taking the lead in advanced technologies such as 5G. China's patent applications worldwide account for 46.4% with the U.S. accounting for 17.9%.<sup>32</sup> Coincidentally, the Regional Comprehensive Economic Partnership (RCEP) was signed in November 2020 for the promotion of free trade in the region. This trade agreement includes Australia, Japan and China, but excludes India and the United States. In contrast to the tensions between China and the Quad, the regional economies are increasingly integrated.

In addition, China has occupied a central position in a global supply chain. In an increasingly interdependent world, maintaining a stable global supply chain has become important for states to sustain a sound economy. Given China's importance in the supply chain, it is not a plausible scenario to exclude the country. In fact, disruptions in the supply chain pose a threat to economic security in an interdependent world. This is well illustrated by the 2010 rare earth shock when China suspended rare earth exports to Japan in retaliation for the arrest of a Chinese captain whose ship collided with a Japan Coast Guard patrol vessel.<sup>33</sup>

When supply chain disruptions occurred in 2020 due to the Covid-19 pandemic which began in China, the Japanese government encouraged companies to relocate their production bases to Japan in return for subsidies. However, only 1,670 out of 35,000 firms operating in China applied for the plan.<sup>34</sup> Moreover, these companies aimed to take advantage of the subsidies to restructure their business in China, rather than shifting their production bases back to Japan. The government's push did not result in their departure from China. These companies continue to be attracted by China's strong economic recovery from the pandemic.<sup>35</sup> In the same vein, the effect of the Resilient Supply Chain Initiative announced by Japan, India, and Australia in September 2020 may be limited. The aim was to diversify a supply chain currently heavily dependent on China and encourage businesses to shift their production

contradictory goals, it has not evolved smoothly. While avoiding openly criticizing China's behavior, the Quad aims to deter China's attempts to change the status quo by force and to ensure a rules-based order. By sending a signal, Quad states hope to convey a message to China that they will not tolerate such behavior. However, even though the four states support a rules-based order, security cooperation has not deepened in a straightforward manner.

The first reason for this is that the interests and views of the four states are not identical. Second, the goal of building a prosperous and peaceful region is not likely to be achieved without China. The economies of the region depend on the China-centered supply chains, and are deeply integrated. Being fully aware of its political weight, China links politics to the economy. As a result, Australia is suffering from Chinese economic retaliation for being outspoken, and other states are concerned about being targeted. While the four nations hope to separate politics from economics, China does the opposite. Consequently, the four nations refrain from squarely criticizing China's maritime movements. Failure to name China at the Quad summit meeting is an example of this approach.<sup>36</sup>

In essence, because Quad hopes to achieve two contradictory goals, it has not evolved smoothly and quickly. It is difficult for states to choose between security and the economy. No state is ready to clearly prioritize one over the other. If there is no trade-off, what can be done?

First, establishing supply chains that do not overly depend on China is an urgent task if China is to be prevented from using its economic strength as leverage. Heavy dependence on China for non-replaceable resources and parts will continue to allow Beijing to use its economic might to coerce. As demonstrated by Japan's unsuccessful attempt to encourage relocation of firms, it is not easy to persuade industries to follow government preferences. The private sector, which seeks to expand their short-term profits, might deepen their dependence on China for strategic materials without thinking of

## **“It is difficult for states to choose between security and the economy. No state is ready to clearly prioritize one over the other.”**

bases from mainland China to other countries in the region. However, the chances of such relocation may be slim without a stronger push from the government.

### **Conclusion and Policy Implications**

This paper showed that the four states participating in the Quad have varied interests and this divergence has slowed the Quad's evolution. It also demonstrated that the Quad has two contradictory goals: to maintain the rules-based order based on international law and to promote a prosperous region which could not possibly exclude China. Because the Quad hopes to achieve these two

political consequences. Therefore, the government needs to take initiatives to restructure or monitor the supply chain to avoid overdependence on China. A long-term strategy is essential.

Second, given China's growing economy and military might, Quad member states may be tempted to pursue a hedging strategy. However, adopting such a strategy also weakens cooperation and unity among them. To avoid a situation in which one state may end up holding a “hot potato” due to a policy shift made by the other three nations, member states need to maintain close coordination and dialogue.

<sup>32</sup> World Intellectual Property Organization, “World Intellectual Property Indicators 2019,” [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_941\\_2019.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_941_2019.pdf)

<sup>33</sup> On the 2010 rare earth shock, see, Kyoko Hatakeyama, “Rare Earth and Japan: Traditional vulnerability reconsidered,” in D Kiggins ed., *The Political Economy of Rare Earth Elements: Rising Powers and Technological Change* (Basingstoke: Palgrave Macmillan, 2015) pp. 43-61.

<sup>34</sup> Ministry of Trade, Economy and Industry of Japan, “Sapurai chen taisaku no tameno kokunaitoushi sokushin jigyo hojokin no saitaku jigyo ga kettei sare mashita [the government has decided the project outline for subsidy, which aims to promote domestic investment to ensure a supply chain],” November 20, 2020. <https://www.meti.go.jp/press/2020/11/20201120005/20201120005.html>

<sup>35</sup> Kiyoyuki Seguchi, “Korona demo Nihon kigyo ga Chugoku kara tetta shinai riyu: seifu no kokunai kaiki shien hojokin mo Chugoku bijinesu kakudai ni sekkyoku katsuyo [The reason why Japanese companies do not withdraw from China: Taking advantage of government subsidies],” *The Canon Institute for Global Studies*, December 21, 2020. [https://cigs.canon/article/20201221\\_5534.html](https://cigs.canon/article/20201221_5534.html)

<sup>36</sup> Michelle Ye Hee Lee and Joanna Slater, “Meeting of leaders signals the ‘Quad’ grouping will become central part of the U.S. strategy in Asia,” *Washington Post*, March 13, 2021.

[https://www.washingtonpost.com/national-security/quad-diplomacy-counter-china/2021/03/12/9317aee8-8299-11eb-ac37-4383f7709abe\\_story.html](https://www.washingtonpost.com/national-security/quad-diplomacy-counter-china/2021/03/12/9317aee8-8299-11eb-ac37-4383f7709abe_story.html)

Third, emphasizing the importance of the rule of law through the Quad, rather than the abstract notion of competition with China is important. Articulating a principled approach to cooperation will not only

encourage ASEAN states, which are major stakeholders in maritime disputes but also raise the possibility of promoting the integration of China into a rules-based order.



# Modernizing U.S. Alliances for Maritime Security in the Indo-Pacific

Virginia Bacay Watson<sup>1</sup>

## Introduction

The U.S. alliance system was a post-World War II 'strategic innovation' credited with successfully protecting U.S. global and national interests for over seven decades.<sup>2</sup> Today, however, the North Atlantic Treaty Organization (NATO) and the hub-and-spokes system in Asia have lost their edge and are struggling to adapt to a security environment featuring three new strategic conditions. First, regional skepticism regarding the United States' level of commitment to maintain the stability of 'frontier' regions and alliances is exacerbated by the notion of American decline from a position of global pre-eminence. Second, China is intensifying global efforts to hardwire geopolitical and security conditions to its economic influence. Third, regional security institutions are increasingly strained to maintain unity among their members amidst contentious strategic issues and, in the face of the emergence of alternative regional security arrangements that potentially threaten the centrality of those already existing.

These conditions have driven some U.S. policymakers to re-think the alliance system and ascertain whether it can still serve as the vital node for defense and deterrence in a dramatically transforming global security landscape. NATO says it can. Its Secretary General, Jen Stoltenberg, contends that "NATO is the strongest, most successful alliance in history because we have been able to change."<sup>2</sup> In June 2021, U.S. and Allied leaders met in Brussels armed with the NATO 2030 initiative, a final report of an independent group commissioned by Secretary General Stoltenberg to examine the challenges confronting NATO. The report contains all-important recommendations to refresh and strengthen the Atlantic alliance moving forward.

In the Indo-Pacific, the strategic vision of the United States and its Asian partners and allies have not

**"...like NATO, the hub-and-spokes alliance system can be repurposed and maintained as a centerpiece of U.S. strategy in the Indo-Pacific."**

coalesced around the longstanding hub-and-spokes alliance system but under the normative rubric of a 'free and open Indo-Pacific' (FOIP), a construct of Japanese origin that was embraced by the United States in 2017. FOIP not only provides the strategic underpinning for U.S. formulation of its emerging competition with China, but it has also lent institutional shape to the Quadrilateral Security Dialogue or the Quad, an informal security mechanism of four Indo-Pacific democracies—Australia, India, Japan, and the United States—sharing security and economic interests and concerns. Although still in its nascent phase, the Quad is gaining momentum towards

becoming a major centerpiece of U.S. strategy in the Indo-Pacific.

Nevertheless, the hub-and-spokes system remains a key feature of the regional security architecture. U.S. ties with two spokes, in particular Japan and Australia, continue to evolve and mature, with the Quad being the most recent manifestation of the rising regional strategic clout of the two middle powers. In the maritime domain, Japan and Australia have steadily increased their commitments to Southeast Asia, part of efforts to broaden their defense and development presence in the sub-region in response to China's aggressive actions in the South China Sea (SCS).

But China's increasingly covert and extensive use of gray zone tactics in the SCS and the East China Sea (ECS) undermining the maritime rules-based order is posing a serious challenge to the hub-and-spokes system's ability to deter and defend. The system is grappling with a new strategic reality that tests the utility of existing mutual defense treaties as a basis for allied responses to China's assertive maritime actions and claims. This is especially true for two allies involved in the maritime disputes, the Philippines in the SCS and Japan in the ECS, both located in the geostrategically pivotal first island chain. The Philippines in particular appears extremely vulnerable to Chinese soft and hard pressure given its geographical proximity to China, a China-friendly president, challenged institutions of governance, and still weak maritime capabilities. The question then is, can the hub-and-spokes system in its current state be able to deter and defend U.S. national interests? And if not, how can it be reformed to uphold the maritime rules-based order?

This paper contends that, like NATO, the hub-and-spokes alliance system can be repurposed and maintained as a centerpiece of U.S. strategy in the Indo-Pacific. Currents in the region's maritime domain provide context

that argue for the necessity of retooled alliances. Under the rubric of the emerging U.S.-China great power competition,

interventions in the maritime space—by way of structural-institutional reforms—offer alliance upgrade opportunities. These interventions hold the promise of transformation and disruption, change dynamics that are greatly needed by the alliance system. The paper examines how they can animate revisions and transform an alliance into a modernized version of itself.

## Wanted: A New Architecture

One of the key foreign policy challenges of the Biden administration is re-designing the American alliance structure in the Indo-Pacific—home to five of its seven treaty allies, their biggest strategic rival, and

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<sup>2</sup> Mira Rapp-Hooper, *Shields of the Republic: the triumph and peril of America's alliances* (Cambridge, MA and London, England: Harvard University Press, 2020), p. 5.

roughly two-thirds of the world's population.<sup>3</sup> Conditions that spurred the creation of the hub-and-spokes model are no longer present, and the challenge that China poses today calls for a different alliance arrangement and a "different mix of partners."<sup>4</sup> Discourse on this issue has coalesced around three distinct, although not mutually exclusive, modalities.

The first, discussed briefly in the introduction above, explores the significance and possibilities of the Quad as an alternative alliance model. The group's first summit in March 2021 gave credence to what has been described as the advent of a new pillar of U.S. strategy in the Indo-Pacific, following the group's first-ever naval exercises in the Indian Ocean in November 2020.<sup>5</sup> Whether the Quad is to become Asia's NATO forms the core of a variant of this 'new alliance' theme. The biggest hurdle to the realization of this idea is India's long tradition of non-alignment. But if successful in some form, the collective strategic powers of the United States, Japan, Australia, and India could provide the democratic bulk to globally counter China and uphold FOIP, a potentially game-changing addition to the United States' Indo-Pacific security architecture.

The anticipated revitalization of NATO mentioned earlier contains the seeds of the second position—a repurposed NATO realizing the idea of an Atlantic-Pacific Partnership (APP) that would act as the "strategic counterweight" to China's growing military assertiveness.<sup>6</sup> The stronger U.S. treaty allies and friends—Japan, South Korea, Australia and New Zealand, already individual Global Pacific Partners of NATO—can serve as the initial nodes to animate closer ties between Europe and the Indo-Pacific through what one proposal designates as a "30+4" consultative network.<sup>7</sup> Proponents of APP suggest that NATO assume the mantle of leadership in this partnership, privileging its institutional experience and strengths—capabilities, resources, a multilateral and diverse membership, and "structural resilience to Chinese pressure" in the maritime domain—core competencies that supplement weak multilateral, Asian-based institutions like the Association of Southeast Asian Nations (ASEAN).<sup>8</sup>

One possible start-off point for this partnership is merely to have NATO observers present during the conduct of Indo-Pacific military exercises. Any formal military participation of NATO in other geographic areas would require endorsement by the NATO Military Committee and approval by the North Atlantic Council, a process that could prove contentious and difficult in an

organization whose decisions require consensus among its 30 member countries.<sup>9</sup> Another route would be to have a dialogue and consultation on China, a recommendation of the NATO 2030 report as an initiative to reimagine NATO and strengthen the alliance moving forward.<sup>10</sup>

The timely convergence of strategic interests, addressing the China security challenge in the maritime domain, serves as an accelerant in building closer Europe-Asia ties. The proposed partnership sends a clear message that "NATO's increased engagement on China is a part of a natural evolution of its relationship in the Asia-Pacific, rather than just a thumb in China's eye."<sup>11</sup> The other important message with the introduction of the NATO factor in the South China Sea/Indian Ocean is the European affirmation of a world order based on the rule of law and peaceful coexistence. A French scholar argues that the SCS disputes "have come to embody existential issues for EU...Apparently, the world that China wants to create...is one based on strategic intimidation and threats...and is not of the same nature as the one the EU envisions."<sup>12</sup>

But this Atlantic-Pacific Partnership approach is handicapped in several ways. For the U.S. Asian allies, relations with NATO are important, but not as critical as their relations with China and the United States. This is especially true for those with maritime disputes with China. In Southeast Asia for example, the logic of foreign and defense policies follows the logic of geography and power (i.e., relations with neighbors and powerful "outsider" actors place high on the priority list). The onus will be on NATO to demonstrate to its Asian partners that there is value-added in developing close ties with it. The NATO partners will be challenged by the enormous strategic diversity among its potential Asian partners. Featuring U.S. alliances in Asia as an integral part of a NATO refresh will take time as NATO will have to work the traplines country by country. Confidence-building measures such as observing the military exercises of NATO's Asian Global Partners are good first steps towards constructing closer ties.

The third modality argues that subject to extensive reforms, U.S. alliances in Asia should be able to defend U.S. national interests, act as a counterweight to Chinese influence and power, and deter military and nonmilitary threats alike. Reforms needed include: updating the threshold for collective defense to cover information warfare and cyberattacks that circumvent U.S. defense treaty commitments; 'reinforcing Asia' as China rises (e.g., the United States and its allies help Southeast Asian

<sup>3</sup> Jack Detsch, "Biden looks to contain China—but where's the Asian NATO?," March 26, 2021, <https://foreignpolicy.com/2021/03/26/biden-china-asian-nato/#>.

<sup>4</sup> Hal Brande, "An Asian NATO? The U.S. has better options for its allies," September 23, 2020, <https://www.bloomberg.com/opinion/articles/2020-09-23/an-asian-nato-u-s-has-better-options-for-its-allies-and-china>.

<sup>5</sup> Michelle Ye Hee Lee and Joanna Slater, "Meeting of leaders signals the 'Quad' will become central part of U.S. strategy in Asia," *The Washington Post*, March 13, 2021, [https://www.washingtonpost.com/national-security/quad-diplomacy-counter-china/2021/03/12/9317aee8-8299-11eb-ac37-4383f7709abe\\_story.html](https://www.washingtonpost.com/national-security/quad-diplomacy-counter-china/2021/03/12/9317aee8-8299-11eb-ac37-4383f7709abe_story.html).

<sup>6</sup> James Hildebrand et al., "Build an Atlantic-Pacific Partnership," *Atlantic Council*, October 14, 2020, <https://www.atlanticcouncil.org/content-series/nato20-2020/build-an-atlantic-pacific-partnership/>.

<sup>7</sup> NATO has nine "global partners" which it cooperates with on an individual basis. Aside from the four mentioned above, the other global partners are: Afghanistan, Colombia, Iraq, Mongolia, and Pakistan. "Relations with partners across the globe," *NATO*, July 8, 2020, [https://www.nato.int/cps/en/natohq/topics\\_49188.htm#:~:text=NATO%20has%20nine%20%E2%80%9Cpartners%20across%20the%20globe%E2%80%9D%20or,Republic%20of%20Korea%2C%20Mongolia%2C%20New%20Zealand%20and%20Pakistan](https://www.nato.int/cps/en/natohq/topics_49188.htm#:~:text=NATO%20has%20nine%20%E2%80%9Cpartners%20across%20the%20globe%E2%80%9D%20or,Republic%20of%20Korea%2C%20Mongolia%2C%20New%20Zealand%20and%20Pakistan).

<sup>8</sup> *ibid.*

<sup>9</sup> Mirna Galic, "Opportunity knocks for NATO and its partners in the Asia-Pacific," *Atlantic Council*, March 26, 2021, <https://www.atlanticcouncil.org/blogs/new-atlanticist/opportunity-knocks-for-nato-and-its-partners-in-the-asia-pacific/>.

<sup>10</sup> "NATO 2030: United for a New Era," *NATO*, November 25, 2020, [https://www.nato.int/nato\\_static\\_f2014/assets/pdf/2020/12/pdf/201201-Reflection-Group-Final-Report-Uni.pdf](https://www.nato.int/nato_static_f2014/assets/pdf/2020/12/pdf/201201-Reflection-Group-Final-Report-Uni.pdf), p. 28.

<sup>11</sup> Mirna Galic, "Opportunity knocks for NATO and its partners in the Asia-Pacific," *Atlantic Council*, March 26, 2021, <https://www.atlanticcouncil.org/blogs/new-atlanticist/opportunity-knocks-for-nato-and-its-partners-in-the-asia-pacific/>.

<sup>12</sup> Sophie Boisseau du Rocher, "The EU's South China Sea Challenge," *The Diplomat*, February 1, 2021, <https://thediplomat.com/2021/01/the-eus-south-china-sea-challenge/>.

countries counter maritime and economic coercion through direct assistance or capacity-building programs); ‘rebalancing’ collective defense responsibilities (i.e., broadening the definition of ally ‘contributions’ to cover diplomatic, intelligence, economic and technological domains) to optimize collaboration among allies; and developing a new alliance narrative to muster up domestic support.<sup>13</sup>

The contention of this paper to maintain a reformed hub-and-spokes system as a key feature of the U.S. Indo-Pacific strategy builds on this position and is discussed in the next section.

### Modernizing the Hub-and-Spokes

In this period of U.S.-China tension, the maritime domain has emerged as an intensely contested space, and Beijing’s success in its employment of gray zone tactics in the SCS and ECS juxtaposed against the dearth of effective, collective, and coordinated responses from the U.S. and its treaty allies in Asia has exposed structural and institutional gaps in the hub-and-spokes system. In particular, on the structural level, the current hub-and-spokes arrangement that privileges bilateral relations has not supported the development of an all-of-alliance communications system with which the U.S. and its five treaty allies can share/exchange classified and confidential information. On the institutional level, the maritime gray zone encounters of the Philippines and Japan demonstrate the need to frame and develop ‘just below the threshold of war’ collective and/or coordinated responses outside the legal cover of Article V of their respective defense treaties with the United States.

In addition to the reforms suggested in the preceding section thus, this paper proposes that, to update the hub-and-spokes and make them more responsive to urgent regional maritime security problems, there is a need to develop targeted responses to the challenge of structural and institutional coordination. The United States and its Asian treaty-allies should organize an interim working group composed of personnel from their countries with two mandates:

The first is to address two pressing, immediate concerns: the lack of a system-wide communications system and the lack of a response plan to manage gray zone attacks in the SCS and ECS. The group should prioritize:

- a) the development of system-wide communications protocols that should aim to facilitate a common operating picture during gray zone operations, improved operational and policy coordination, a consistent alliance response, and better alliance resource management.<sup>14</sup> The lack of an integrated communications system is a major problem that needs immediate collective attention and requires a structural home. Because of the bilateral nature of the hub-and-spokes system, there are currently no arrangements charged with developing integrated approaches or responses to unconventional forms of conflict, nor to counter gray zone operations.

- b) Development and framing “just below the threshold of war” responses outside the ambit of Article V of their respective defense treaties with the United States aimed at deterring gray zone operations in the SCS and ECS. The working group should consider the feasibility of setting up a prototype of an organization similar to the ‘Five Eyes,’ a network composed of the United States, NATO allies, and key partners that routinely share information.

The second and long-term mandate is to draw up plans for the design and construction of a permanent all-alliance central structure. This new structure, composed of personnel from the six allied nations and led by a rotating leadership among the allies, will sit at the center of the alliance system. However, rather than merely replacing the United States as the new hub, it becomes the central organization responsible for managing all modalities of spoke-to-spoke multilateral/bilateral engagements as well as the coordination of alliance requirements, resources, and responsibilities.

From a network perspective, this proposed structure is defined as an “impact hub:” an issue-specific organization that sits at the center of a set of important actors working on a particular problem—coordinating their collective work toward common, clearly measurable goals and outcomes.

A hub could be an existing international or regional organization, a coalition of nongovernmental organizations, or a new secretariat within the UN system specifically created for that purpose.<sup>15</sup> The proposed central organization falls within the last category described above, a new structure is given a clear mandate to coordinate, integrate, and create policies and mechanisms that facilitate alliance cooperation and

## “Establishing an intra-alliance organization modernizes the approach of maintaining bilateral (i.e., hub-and-spokes) ties...”

collaboration where needed. Network scholars argue that the formation of powerful hubs triggers a “natural growth process” and “preferential attachment” where nodes with the most connections attract the greatest number of new connections.<sup>16</sup> If successful, the proposed joint, central structure could well serve to be the innovation within the alliance system that will pave the way for a reimagined ‘networked security’ linking not only the U.S. and its Asian allies, but potentially including other partners and allies, and subsequently the Pacific and Atlantic alliance systems.

<sup>13</sup> See, for example, Mira Rapp-Hooper, *Shields of the Republic: The triumph and peril of America’s Alliances* (Cambridge, MA and London, England, 2020), p. 178-192.

<sup>14</sup> Takashi Saito et al, “Options for Japan-U.S. cooperation in coping with gray-zone operations over the Senkaku Islands,” in Jonathan Greenert, ed. *Murky waters in the East China Sea* (National Bureau of Asian Research, NBR Special Report #90, May 2021), p. 22-23, [https://www.nbr.org/wp-content/uploads/pdfs/publications/sr90\\_murkywaters\\_may2021.pdf](https://www.nbr.org/wp-content/uploads/pdfs/publications/sr90_murkywaters_may2021.pdf).

<sup>15</sup> Anne-Marie Slaughter and Gordon LaForge, “Opening up the Order,” *Foreign Affairs*, 14, no.2, March/April 2021, p. 159.

<sup>16</sup> Anne-Marie Slaughter and Gordon LaForge, “Opening up the Order,” *Foreign Affairs*, 14, no.2, March/April 2021, p. 160.

Establishing an intra-alliance organization modernizes the approach of maintaining bilateral (i.e., hub-and-spokes) ties in several ways. First, creating a “shared structure” from which “the U.S. and its Asian allies can develop and direct high-stakes defense strategy” weans them away from being too dependent on bilateral arrangements.<sup>17</sup> The recourse to a shared structure lends

characterized the post-war hub-and-spokes alliance. And finally, the creation of a joint structure acts as a centripetal mechanism that weaves anew the democratic ties that bind the allies. In the face of China’s strategic calculus that aims, vis-à-vis the West, to win over its Southeast Asian neighbors, fortifying rules-based values is assuming greater importance.

**“The introduction of an intra-alliance structure at the center of the reimagined system reconfigures alliance relationships, giving greater agency to weaker allies and less burden to the stronger partners.”**

itself to more efficient coordination as a group that “serves—and benefits from—assurance efforts that would deepen and broaden U.S. alliances and partnerships.”<sup>18</sup> This arrangement thus allows allies to extract both bilateral and multilateral benefits from the alliance. Second, this central ‘impact’ structure has the net effect of strengthening the alliance: it would continue to build the habits of working together and would create a level of trust broader than just ties with the United States.<sup>19</sup> Facilitating this trust-building process is the rotating leadership of the organization among the allies, the necessity of conducting robust multilateral spoke-to-spoke relations among the allies, and in the case of Japan-South Korea ties, working side-by-side in the joint, central organization as an institutionalized opportunity to improve relations and create more space for trust to grow. Third, operating with a center also predisposes the development of tighter strategic alignments across the alliance that translates to practical interoperability and coordination. Fourth, it also provides the Philippines and Thailand the opportunity to grow as partners, e.g., to ‘co-create’ institutional and/or policy innovations with the more resourced and advanced allies—to upgrade their competencies and capabilities. The impact hub, in effect, can function as a structural-institutional lever to advance alliance parity, away from the asymmetry that

### Conclusion

Alliance reforms should not merely strive to reproduce pre-existing levels of cooperation and trust among allies. Rather, the design construct of strategic upgrades expected from revitalized alliances should encourage higher levels of cooperation and trust. The hub-and-spokes alliance system can be retooled. The introduction of an intra-alliance structure at the center of the reimagined system reconfigures alliance relationships, giving greater agency to weaker allies and less burden to the stronger partners.

The stakes are enormously high. China’s gray-zone operations are becoming more overt, information warfare narratives are increasingly sophisticated, disinformation campaigns are becoming more commonplace, and the convergence of maritime and cyber insecurity is slowly taking shape. But most important of all, the nature and extent of today’s threats carry the potential of upending the very post-World War II international order that the U.S. global alliance system nurtured and protected. Modernized alliances should be a part of the strategic effort to counter the threat — sharp, competitive, institutional weapons that protect and uphold rules-based values.

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<sup>17</sup> Mira Rapp-Hooper, *Shields of the Republic: The triumph and peril of America’s Alliances*, p. 184.

<sup>18</sup> Ibid.

<sup>19</sup> Ellen Bork, “The Long History of the ‘NATO for Asia’ Idea,” *American Purpose*, October 8, 2020, <https://www.americanpurpose.com/articles/the-long-history-of-the-nato-for-asia-idea/>.

# Maritime Governance Capacity Building: A U.S.-Japan Alliance Agenda for Rule of Law in the Indo-Pacific

John Bradford<sup>1</sup>

## Introduction

The Indo-Pacific is a region beleaguered by challenges that undermine the safety and security of those seeking to benefit from the free, fair, and legal use of the sea. State and non-state actors are exploiting weak governance and are creating legal gray space to take actions that directly undermine the security of others. State struggles over sovereignty and administrative control dominate maritime security policy discussions in Washington and Tokyo. However, leaders in other Indo-Pacific capitals are often more immediately concerned about daily losses of life and livelihood caused by activities such as illegal, unreported and unregulated (IUU) fishing, smuggling, terrorism, piracy and sea robbery. The key to rolling back both the state and non-state actors behind these problematic activities is improved governance capacity among the region's coastal and archipelagic states. The United States and Japan are the two states best positioned to assist with the development of such capacity and can accomplish more acting together than alone. Therefore, the U.S.-Japan Alliance should develop and implement a more holistic strategy to address the full range of Indo-Pacific maritime challenges. This strategy should maintain focus on military competition, while significantly expanding activities to enable the regional maritime governance needed to address the challenges that most littoral partner states place at the top of their policy agendas.

This paper is divided into seven sections. The first describes the challenges to rule of law at sea in the Indo-Pacific noting that both state and non-state actors exploit weak governance for their own ill-gotten gains and the need for improved maritime governance capacity to address those threats. The second section focused on how maritime governance is specifically useful in checking Chinese 'gray zone' strategies that exploit weaknesses in the rule of law. The next section evaluates the strengths and weaknesses of the U.S.-Japan Alliance as the cornerstone of regional maritime security. The fifth section describes U.S. and Japanese maritime security capacity-building initiatives in Southeast Asia while the sixth discusses the challenges that have prevented alliance managers' ambitions to coordinate capacity-building projects has yielded few practical outcomes. The final section provides four specific recommendations regarding the implementation of cooperative capacity building as an Alliance agenda.

## Challenges to Rule of Law at Sea in the Indo-Pacific

The United Nations describes rule of law as a principle of governance in which all persons, institutions and entities, public and private, including states, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated. Rule of law is fundamental to international peace, security and political stability; to achieve economic and social progress and development; and to protect people's rights and fundamental freedoms.<sup>2</sup> In the maritime space, rule of law is closely connected to maritime governance, a concept that links two key elements: deliberately established rules and the effective enforcement of those rules. The former involves the standards by which states and non-state actors behave in relation to one another, and the latter involves the mechanisms and methods which ensure that all actors behave in conformity with those standards.<sup>3</sup>

Maritime rule of law is particularly important to ensuring the prosperity of the Indo-Pacific, a region rich in maritime resources and home to essential marine ecosystems. It also houses the world's busiest sea lanes, routes that carry the goods created and consumed by several of the world's largest economies. Unfortunately, rule of law is being threatened across much of the region. The rules governing proper behavior at sea are, for the most part, global standards. However, in the Indo-Pacific, both state and non-state actors are making deliberate decisions to ignore or circumvent those rules for their gain. Most of the coastal states lack sufficient capacity to provide the enforcement elements required to counter the

**“...rule of law is being threatened across much of the region. The rules governing proper behavior at sea are, for the most part, global standards. However, in the Indo-Pacific, both state and non-state actors are making deliberate decisions to ignore or circumvent those rules...”**

malicious actors responsible for these transgressions. Such rule-breaking activities have immediate, long-reaching, and dire impacts on the societies of the region.

The unlawful activities of non-state actors create daily losses of life and livelihood in the Indo-Pacific. For example, non-compliance with regulations governing safety at sea causes ferry disasters that claim hundreds of

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<sup>2</sup> "What is rule of law?" *United Nations*, <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/>.

<sup>3</sup> Jonathan Odom, unpublished manuscript.

lives each year.<sup>4</sup> Similarly, environmental destruction endangers the health of ecosystems and human communities. With thirty percent of the world's coral reefs being in Southeast Asia's threatened Coral Triangle, an area that plays a critical role in the Indo-Pacific maritime ecosystem, it is clear that environmental damage is not localized, but has global impacts.<sup>5</sup> Each year, tens of billions of dollars' worth of fish and other maritime resources are harvested through IUU means, thereby undermining good order at sea and perpetuating poverty ashore. Analysts also warn that regional fishery stocks are on the brink of a collapse that could cause a major socio-economic shock.<sup>6</sup> Although Southeast Asian sea robbery and piracy peaked in the early 2000s and international efforts have rolled back piracy in the western Indian Ocean, over one thousand attacks have been reported in the last dozen years and new hotspots are developing.<sup>7</sup> In addition, maritime-savvy terrorists such as the Abu Sayyaf Group continue to pose a threat. While Philippine and Malaysian law enforcement operations have delivered blows to this organization in the last year, authorities continue to stress risks that include the kidnapping of mariners and the use of amphibious tactics to raid communities ashore.<sup>8</sup> Abu Sayyaf's global linkages dictate that these operations impact the security situation well beyond their immediate operating area.

States are also electing to disobey the rules. While various states have been accused of undermining good order at sea through actions that are non-compliant with the rule of law, China remains the most frequent and most aggressive culprit in the Indo-Pacific. Its behaviors provide the clearest and most egregious examples of state action that undermine maritime governance. In some cases, states simply elect open non-compliance as a perceived path to consolidate near-term gains. A prime example of this non-compliance is the PRC's refusal to acknowledge the authority of the 2016 ruling on the South China Sea delivered by the Permanent Court of Arbitration (PCA) in The Hague. Beijing also uses its Navy, Coast Guard, and maritime militia to seize resources to which it is not legally entitled. In other cases, states exploit weaknesses in governance to prey on weaker maritime stakeholders or shift the status quo to create a landscape more favorable to their own interests. The seizure of fish-aggregating devices by the Chinese Coast Guard from Filipino fishermen provides an example of state actions that directly undermine the security of individuals.<sup>9</sup> The tactics the PRC employed when wresting control of Scarborough

Shoal in 2012 and in the situation around Whitsun Reef in 2021 exemplify additional transgressions that take advantage of weak governance to shift the international status quo.<sup>10</sup> The papers by Atsuko Kanehara, Thi Lan Huong Nguyen and Yurika Ishii in this volume explain how PRCs activities, and in particular, the creation of recent domestic legislation, directly undermine the rule of law in the region's international maritime space.

## Maritime Governance as the Key to Checking PRC Gray Zone Strategies

When the PRC is faced with strength it tends to pursue its desires by employing 'gray zone' strategies. This type of behavior has been defined as "an effort or series of efforts beyond steady-state deterrence and assurance that attempts to achieve one's security objectives without resort to direct and sizable use of force. In engaging in a gray zone strategy, an actor seeks to avoid crossing the threshold that results in war."<sup>11</sup> Japan's 2020 White Paper explains that gray zone situations are, "neither purely peacetime nor contingency situations," and that they, "are becoming persistent over a long period of time, playing out as part of inter-state competition. They may possibly further increase and expand. Such gray zone situations harbor the risk of rapidly developing into graver situations without showing clear indications."<sup>12</sup> Even when gray zone activities do not escalate into conflict, by their fundamental nature, their impacts are the principles of good governance and rule of law.

A clear example of Chinese reliance on a gray zone strategy takes place around the Senkaku Islands. The resolve of the Japanese state, ready to employ the tremendous capabilities delivered by the Japan Maritime Self Defense Force (JMSDF) and Japan Coast Guard (JCG) and backed by a credible U.S. security commitment, has thus far deterred the PRC from using direct action to act on its territorial claims. Instead, the PRC uses fishing boats and Coast Guard forces to intermittently enter the territorial seas around the Senkaku Islands and hinder JCG activities, all to erode Japan's administrative control without escalating the situation to the point of warranting the use of force by either side.<sup>13</sup> Military assets of both Japan and the PRC stage nearby to prevent the contest from leaving the gray zone. Shuxian Luo's paper in this volume does an excellent job detailing the complexities involved with providing governance over non-state and sub-state actors in this contested area.

<sup>4</sup> Siswanto Rusdi, "Why are ferry accidents common in Indonesia?" interview, *Deutsche Welle (DW)*, June 26 2018, <https://www.dw.com/en/why-are-ferry-accidents-common-in-indonesia/a-44403800>; Jessica Mendoza, "Philippines ferry capsizes: Why are accidents so common?" *Christain Science Monitor*, July 2, 2015, <https://www.csmonitor.com/World/Global-News/2015/0702/Philippines-ferry-capsizes-Why-are-accidents-so-common>.

<sup>5</sup> "What is the coral triangle?" *Earth.org*, June 9, 2020, <https://earth.org/coral-triangle/>.

<sup>6</sup> Peter Chalk, "Illegal fishing in Southeast Asia: a multibillion-dollar trade with catastrophic consequences," *ASPI The Strategist*, July 17, 2017, <https://www.aspistrategist.org.au/illegal-fishing-southeast-asia-multibillion-dollar-trade-catastrophic-consequences/>.

<sup>7</sup> Data compiled from the International Maritime Bureau Piracy Reporting Centre, <https://www.icc-ccs.org/> and the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia, <https://www.recaap.org/>.

<sup>8</sup> "Piracy and armed robbery against ships in asia half yearly report January to June 2021," *ReCAAP Information Sharing Centre*, July 16, 2022, p. 30-2; Cheryl Lin, "Rise in sea robbery in Singapore Strait despite overall drop in the region," *CNA*, July 16, 2021, <https://www.channelnewsasia.com/news/singapore/armed-robbery-sea-ships-singapore-straits-2021-15231754>.

<sup>9</sup> Associated Press, "South China Sea: Philippines protest against China's confiscation of fishing equipment," *South China Morning Post*, Aug. 21, 2020, <https://www.scmp.com/news/asia/southeast-asia/article/3098267/south-china-sea-philippines-protests-chinas-confiscation>.

<sup>10</sup> Michael Green et al., "Counter Coercion Series: Scarborough Shoal Standoff," *Center for Strategic and International Studies*, May 22, 2017, <https://amti.csis.org/counter-co-scarborough-standoff/>; Ryan Martinson, "Manila's Images are revealing the secrets of China's maritime militia," *Foreign Policy*, April 19, 2021, <https://foreignpolicy.com/2021/04/19/manilas-images-are-revealing-the-secrets-of-chinas-maritime-militia/>.

<sup>11</sup> Michael Green et al., *Countering Coercion in Maritime Asia: The Theory and Practice of Gray Zone Deterrence*, Center for Strategic & International Studies, May 9, 2017, <https://www.csis.org/analysis/countering-coercion-maritime-asia>.

<sup>12</sup> Ministry of Defense (Japan), *Defense of Japan 2020* (Tokyo, 2020), p. 41, [https://www.mod.go.jp/e/publ/w\\_paper/wp2020/pdf/R02010100.pdf](https://www.mod.go.jp/e/publ/w_paper/wp2020/pdf/R02010100.pdf).

<sup>13</sup> Hideshi Tokuchi, "The gray zone and the definition of gray-zone warfare: challenge for Japan-U.S. cooperation," in Jonathan Greenert, ed, *Murky waters in the East China Sea* (National Bureau of Asian Research, NBR Special Report #90, May 2021), p. 6; Ryan D. Martinson and Andrew S. Erickson, "Manila's images are revealing the secrets of China's maritime militia," *Foreign Policy*, Apr. 12, 2021, <https://foreignpolicy.com/2021/04/12/manilas-images-are-revealing-the-secrets-of-chinas-maritime-militia/>; Alessio Patalano, "What is China's Strategy in the Senkaku Islands?" *War on the Rocks*, Sept 10, 2020, <https://warontherocks.com/2020/09/what-is-chinas-strategy-in-the-senkaku-islands/>.



Relative to Japan, Southeast Asian states maintain less maritime power. However, U.S. Naval War College Professor Peter Dutton has shown that time, space, forces, and political will are factors that can be combined so that even minor maritime powers can deter Chinese direct activities, prevent escalation and reduce Chinese options in the gray zone.<sup>14</sup> Arguably, the most successful of the resisting states is Vietnam. This owes to its relative naval strength, including its own fortified South China Sea islands and its proven ability to stand unflinchingly in the face of PRC aggressive behavior, while simultaneously working diplomatic channels to de-escalate the situation. However, the Philippines, a state relatively weak on naval power that is also on the front lines of the South China Seas disputes has also blocked Chinese aggression when acting with resolve. For example, China has been deterred from acting on threats to forcibly remove the BRP Sierra Madre from its grounded location on Second Thomas Shoal, has

would lead to war. As trading nations with rich maritime cultures, huge economies, advanced technology, highly capable maritime forces, and positive relationships with almost all of the Indo-Pacific's coastal states, the United States and Japan are also well-positioned to lead regional efforts to enforce maritime rule of law and improve maritime governance. Recent reforms have also enabled the U.S.-Japan Alliance to serve as an increasingly powerful force multiplier, enabling them to efficiently accomplish more than either state could do alone.

Alliance power is concentrated in Northeast Asia where Japan shares maritime borders with other strong states: the PRC, South Korea, and Russia. In these waters, strong maritime domain awareness and enforcement capabilities minimize opportunities for non-state actors to undermine the rule of law, while strong navies deter interstate competition from moving beyond the gray zone. In areas of gray zone competition, such as the waters

**“...enhanced maritime security capacity is essential for littoral states to safeguard their maritime rights and resources, exercise their governance responsibilities, and enable legal users to make safe use of the sea.”**

not stopped the Philippines from renovating and improving facilities on occupied features, and has been unable to advance talk of joint developments past Philippine insistence that any deal clear hurdles framed by the Philippines' constitution and domestic legislation. Yet, states cannot provide governance by simply acting tough. If not backed by capability, showing backbone becomes bluffing. Red lines must be enforceable and maritime domain awareness is needed to make informed decisions. Capacity also provides the confidence necessary to sustain determination.

With both state and non-state actors seeking to exploit weak maritime governance for their own gains, shortfalls in littoral states' maritime security enforcement capacities are at the root of contemporary challenges to the rule of law in the Indo-Pacific maritime domain. Therefore, enhanced maritime security capacity is essential for littoral states to safeguard their maritime rights and resources, exercise their governance responsibilities, and enable legal users to make safe use of the sea. States must possess the information necessary to understand and predict illegal or gray zone maritime activities, as well as the strength to deter actions that are contrary to the rule of law, by way of either denying opportunity or punishing culprits. To this end, any maritime governance capability is valuable. Capabilities best suited for one governance activity can also be applied in others or, free up resources that are currently being used inefficiently. Because maritime domain awareness capabilities are often highly fungible and enable smart decisions, they deliver some of the most efficient additional capacities.

**The U.S.-Japan Alliance as the Cornerstone of Regional Maritime Security**

The U.S.-Japan Alliance is regularly referred to as the cornerstone of regional security. Indeed, the geopolitical, informational, and military power delivered by the Alliance is incredible, and Alliance hard power provides the core deterrence capabilities that prevent states from committing the sort of acts of aggression that

around the Senkaku Islands, Japan and the United States have been able to couple diplomatic engagement and hard-power deterrence to prevent escalation and, thus far, ensure continued Japanese administration of the islands. In this area, the United States and Japan can best strengthen the rule of law by closing the legal gaps that reduce the effectiveness of their activities and working to prevent sub-state and non-state actors from taking actions that prime the situation for escalation. The papers by Yurika Ishii and Shuxian Luo in this volume make these points well. Luo's paper also makes concrete recommendations regarding how Japan might work with China to manage tensions and address escalation risks.

The United States and Japan have less power to directly sustain the rule of law in Oceania, Southeast Asia and the Indian Ocean. Geographic distance makes it more difficult for the Alliance to mass force, though both can deploy their blue water forces when necessary. More significantly, the most important waters, to include the region's many critical maritime chokepoints, are under the sovereign control of the coastal states. Unfortunately, relative to those in Northeast Asia, these coastal states generally have less maritime enforcement capacity and thus the waters are often poorly governed. Because the coastal states have little desire to share their sovereign responsibilities with foreign powers, capacity-building assistance is the primary means through which the United States and Japan can assist. Both the United States and Japan have been providing training and hardware to coastal states.

Such capacity development is essential for the region's coastal states to deal with both state and non-state threats to maritime governance. While the Indo-Pacific coastal states resist unlawful Chinese activities that infringe upon their rights, they tend to worry as much, or more, about being caught in the middle of Sino-American competition. Therefore, regional states are hesitant to be drawn into the security dilemmas associated with leaning too heavily on American assurances. These perspectives are strengthened by the lessons that some regional leaders

<sup>14</sup> Peter Dutton, "Up for debate – China now has the capability to control the South China Sea in all scenarios short of war with the United States." *Center for Strategic and International Studies (CSIS) China Power Conference*, Nov. 29, 2018, minute 7, <https://www/csos.org/events/chinas-power-1>.

drew from events that played out around the Scarborough Shoal in 2012 and near West Capella in 2020, which both reinforced the concept that fleeting American power can sometimes do more harm than good.<sup>15</sup> Given these realities, the U.S.-Japan Alliance should continue their strong naval presence activities, but can best increase their contribution to rule of law in the maritime Indo-Pacific by significantly enhancing their capacity-building engagements with coastal states.

### **U.S. and Japanese Maritime Security Capacity Building Initiatives in Southeast Asia**

Japan and the United States are already large-scale investors in Indo-Pacific maritime capacity building, but more can be achieved. While allocating additional resources would be welcome and should be possible, budget constraints suggest that there is more to be gained from improving the efficiency of the resources being allocated. By sharing information, coordinating activities, leveraging each other's comparative strengths, and establishing joint projects, the US-Japan partnership can gain greater efficiencies. Therefore, Southeast Asia's maritime governance capacity building should become a leading U.S.-Japan Alliance agenda. Southeast Asian searoutes are critical to Japanese (and thereby the United States) security and the region is ready to accept well-designed capacity-building projects. While the Indian Ocean and Oceania regions have similar needs, those areas are farther from the Alliance's geographic core and would be better serviced by partnerships involving India and Australia, respectively.

Japan has been making remarkable investments in Southeast Asia maritime capacity for more than fifty years. Since the 1960s, Japan has used Foreign Direct Investment and Overseas Development Assistance (ODA) to deliver massive support to develop the ports and the searoutes that fueled Japan's economy and thereby served as the crux of Japan's comprehensive security strategy. From 1999, Japan began supporting capacity development aimed at maritime law enforcement and expanded the regional role of the Japan Coast Guard. About a decade ago, Tokyo greenlighted expanded overseas missions for the Japan Maritime Self Defense Force (JMSDF). The JMSDF, ranked among the world's most powerful navies, now maintains a permanent presence conducting maritime security operations in the Indian Ocean, regularly exercises in the South China Sea, and delivers security cooperation activities with partners throughout the Indo-Pacific.<sup>16</sup> Transfers of patrol aircraft and air defense radars to the Armed Forces of the Philippines set precedent for future transfers of defense systems such as the frigates that might be bound for Indonesia.<sup>17</sup>

American projects address the full gamut of regional maritime security capabilities with the national policy focus and funding centered on the Department of Defense (DoD). In fact, U.S. military capacity-building programs are of a scale unrivaled in the region and its assistance seeks to respond to traditional and non-

traditional threats. However, statutory restrictions limit the support the military can provide to support law enforcement activities and the development of civil capacity. While U.S. Army leaders have spoken about their desire to make contributions to the fight against IUU fishing, it is difficult to see how their authorities and capabilities can efficiently offer meaningful support.<sup>18</sup> Beyond the DoD, a host of other American agencies run other maritime capacity-building programs in Southeast Asia. These include the State Department, the Department of Agriculture, the Department of Transportation, the Department of Homeland Security, the U.S. Agency for International Development, the National Oceanographic and Atmospheric Administration. However, the civilian projects are largely uncoordinated with those of the DoD and total to a sum smaller than those of Japan.

American capacity-building activities also tend to exist in the shadow of U.S. military exercises and the Freedom of Navigation Operations (FONOPs) which gather an overwhelming majority of media attention and punditry. In fact, the headline-grabbing nature of these activities contributes to a perception that American maritime security programs are over-militarized. This has an eclipsing impact on activities focused on advancing capacity through improved economic development and maritime management. Rather than shining light on this good work, American security leaders' rhetoric often exacerbates the situation as it frequently uses the term "maritime security" as a diplomatic euphemism for naval competition with China. As a result, policy discussions and the mainstream research agenda underplay the potential contributions of the U.S.-Japan partnership to the holistic strengthening of Southeast Asia's maritime security.

### **The Underlying Challenges to Cooperative Capacity-Building**

U.S.-Japan Alliance conversations regarding cooperative capacity building to address the diverse maritime challenges facing the region have been taking place for years. Going beyond talk, two Alliance statements document senior leaders' commitments. A 2015 joint statement from President Barack Obama and Prime Minister Shinzo Abe noted their agreement to "coordinate capacity-building assistance for maritime safety and security in the Asia-Pacific region." The April 2019 2+2 statement issued by Secretary of State Mike Pompeo, Acting Secretary of Defense Patrick Shanahan, Foreign Minister Kono Taro and Defense Minister Iwaya Takeshi was more detailed. It pledged Alliance activities to include "joint exercises and port calls with partners in the region, capacity building in such areas as maritime domain awareness and law enforcement, and promotion of sustainable economic development and connectivity through quality infrastructure." However, mentions of cooperative capacity-building were absent from the Alliance's senior leaders' statements for the remainder of the Trump Administration. The Biden Administration

<sup>15</sup> Euan Graham, "U.S. Naval standoff with China fails to reassure regional allies," *Foreign Policy*, May 4, 2020, <https://foreignpolicy.com/2020/05/04/malaysia-south-china-sea-us-navy-drillship-standoff/>.

<sup>16</sup> John Bradford, "Japanese Naval activities in Southeast Asian waters: building on 50 years of maritime security capacity building," *Asian Security*, vol. 17, no. 1, May 2020.

<sup>17</sup> John Bradford, "Southeast Asia: a new strategic nexus for Japan's maritime security," *Center for International Maritime Security*, Sept. 21, 2020 <https://cimsec.org/southeast-asia-a-new-strategic-nexus-for-japans-maritime-strategy/>; Ristian Atriandi Supriyanto, "Indonesia's opportunistic approach to arms procurement," *East Asia Forum*, July 1, 2021, <https://www.eastasiaforum.org/2021/07/01/indonesias-opportunistic-approach-to-arms-procurement/>.

<sup>18</sup> "Indo-Pacific land power conference," *U.S. Army Pacific Public Affairs*, May 24, 2021, <https://www.pacom.mil/Media/News/News-Article-View/Article/2629764/indo-pacific-land-power-conference/>.

seems to have made a point to put Japan at the center of its Asia policy, but none of the bilateral meeting readouts have mentioned maritime capacity-building.<sup>19</sup>

Without a top-down push, those at the implementation level are less likely to prioritize this work over other “good ideas” and those who do find them out of synch with their immediate managers who may be focused on other opportunities. Bureaucratic stovepipes also impede coordination between the specialized agencies. As a result, progress has been slow. Alliance exercises in Indo-Pacific waters have expanded significantly and trilateral naval exercises have become more common, but cooperative maritime domain awareness, law enforcement projects, and civilian maritime capacity-building projects have been limited to a small number of activities in the Philippines and Vietnam. The only cooperative maritime infrastructure project to date has been the installation of an undersea cable to Palau supported by the United States, Japan and Australia.<sup>20</sup>

Even if senior leaders were to elevate the priority given to cooperative capacity-building, developing and implementing such a strategy will require careful, deliberate decisions. Neither government has a single source knowledgeable about their own diverse initiatives. While some efforts have been made to do quiet stocktakings, other efforts have sought to avoid breeding mistrust associated with rumors of secret meetings and enhance regional buy-in by hosting large multilateral events, such as the maritime domain awareness capacity meetings that were hosted by U.S. Pacific Command and the Daniel K. Inouye Asia-Pacific Center for Security Studies annually from 2014 to 2019.<sup>21</sup> Other events have looked to include partners such as Australia, India and European states or organizations. While transparency and inclusivity are essential elements of a cooperative capacity-building program, in these cases, the scope of the discussions grew so large that concrete opportunities were lost in favor of abstractions and the sharing of wish lists without concrete backing. These lessons demonstrate that if and when senior leaders re-establish cooperative maritime capacity-building as a top Alliance agenda, implementers must think more strategically as they move ahead.

## Recommendations

Four specific actions could help guide the implementation of an Alliance-based cooperative capacity-building agenda. First, priority should be given to projects focused on maritime infrastructure, environmental protection, resource management, domain awareness and law enforcement. Second, a senior coordination committee should be established. Third, working-level coordination should be centered in the coastal states’ capitals. Fourth, only once these elements are up-and-running should additional nations be brought into the partnership.

Within this Alliance capacity-building agenda, projects focused on improved maritime infrastructure, environmental protection, resource management, domain awareness, and law enforcement capacity should be prioritized over naval modernization. This will support coastal states’ needs to focus on internal security and

economic development while minimizing the security dilemmas involved with perceptions that they may be increasing their military tilt toward the United States. Concentrating on shoring up civilian maritime security shortfalls will provide greater fungible capacities that will directly enable the capability and political resolve to defend their national interests against both state and non-state threats that challenge the rule of law. Furthermore, focusing on non-military capacity will help Japan preserve its current status as a viable “third option” for coastal states seeking to strengthen external security partnerships without being drawn further into perceived side-taking within the Great Power Competition between the U.S. and the PRC. Given these considerations, as a general rule, information about defense technology transfers and military exercises with coastal states should be shared between the United States and Japan but should be kept in their current military-to-military lane and held at the edges of this Alliance-based maritime capacity-building agenda.

A senior-level regional coordinating committee is necessary to overcome inter-agency stove piping and set the prioritization needed to find resources and sustain implementation-level energy in large bureaucracies. American and Japanese chairs should convene this committee on a regular schedule, perhaps annually to exchange views, set general priorities, and ensure there is transparency for all involved. The establishment of a National Security Council Indo-Pacific Coordinator position creates an opportunity to make the American member of this committee a person positioned to coordinate inter-agency actions. Abe-era reforms in the Japanese government suggest that a Prime Minister’s Office (Kantei) official would be the ideal counterpart. At first blush, this might seem to be aiming too high, and it might seem more in accordance with standing Alliance structures for the American chair to be the Assistant Secretary of State for East Asian and Pacific Affairs (A/S EAP). This should be considered. However, A/S EAP would bring less coordinating authority to the committee and, perhaps more significantly, does not have a natural Ministry of Foreign Affairs counterpart for this endeavor. A/S EAP normally partners with the Director General, North American Affairs Bureau to handle Alliance issues, but the Director General, Asian and Oceanic Affairs Bureau would have better standing with the regional leaders. Using the Alliance Coordination Mechanism would give the agenda an excessively military bias and under-engage the nations’ diplomatic expertise about Southeast Asia.

Regional states should be invited to self-identify their appropriate delegates to meetings of the coordinating committee. Interagency officials from the U.S. Department of Defense and Japanese Ministry of Defence, should be invited to observe, but should not play central roles. This will help ensure that diplomatic, law enforcement and development capacity are not overshadowed by military affairs. Committing to a schedule of annual meetings would help ensure follow-through and sustain prioritization for this effort.

While the coordinating committee would play an important role in this agenda, the implementation work

<sup>19</sup> John Bradford, “Suga-Biden Summit Leaves Japan Driving Cooperation in Maritime Asia,” *Tokyo Review*, April 26, 2021, <https://www.tokyoreview.net/2021/04/suga-biden-summit-leaves-japan-in-the-pilothouse-driving-cooperation-in-maritime-asia/>.

<sup>20</sup> John Bradford, “Japan Takes the Lead in Western Pacific Maritime Security,” *Asia Policy*, 16,2, April 2021, p. 94.

<sup>21</sup> APCSS Editor, “DKI APCSS Hosts the 5th Maritime Shared Awareness in SE Asia Workshop,” *DKI APCSS*, Aug. 8, 2019, <https://apcss.org/dki-apcss-hosts-the-5th-maritime-shared-awareness-in-se-asia-workshop/>.

must take place in the coastal states' capitals. When coordination takes place in Washington or Tokyo it lacks the immediate and sustained interface with the coastal states' leadership. Without that, projects are almost guaranteed to be mismatched from local priorities, lack partner nation buy-in, and be poorly implemented. Therefore, both the U.S. and Japanese governments should establish a central point of contact at every U.S. and Japanese Embassy who is empowered with complete cognizance, though not necessarily control, over their nation's maritime capacity-building project in the partner country and works directly with a host nation point-of-contacts (POC). The POCs should meet regularly to ensure that there is a leveling of information about the various activities and, where possible, develop avenues for increased cooperative efficiency. Similar mechanisms are already working informally in the coastal state capitals where cooperative Alliance capacity-building has progressed the furthest. For example, before the Covid-19 pandemic, JICA representatives in Manila were regularly assembling Filipino and American stakeholders and successfully identifying opportunities to create efficiencies in areas such as boat maintenance and training standards. The Philippines is also where the United States and Japan have, thus far, been most successful with cooperative maritime security capacity-building projects.

While it will be tempting to bring officials from additional partner nations and organizations to these meetings, doing so should be resisted until the trilateral (United States-Japan-coastal partner state) cooperation is moving smoothly. While like-minded states such as Australia, India, South Korea and EU members are all currently involved in regional maritime capacity building, these efforts are at a smaller scale than those of the United States and Japan. Bringing them into the conversations pre-maturely will water down discussions, create

distractions, and push policy actions toward the lowest common denominator. Virginia Watson's paper in this volume details how the current hubs-and-spoke system is poorly designed for this sort of close multilateral cooperation. The paper by Kyoko Hatakayama shows how, even within the Quad relationship, a partnership often mentioned as a potential vehicle for multilateral capacity building projects, diverging policy interests make action difficult. Involving these additional partners after trilateral processes mature may enable opportunities to find expanded multilateral efficiencies. The exception to this rule of thumb should be in the area of infrastructure projects where the high costs would be best addressed in tandem with existing coordination projects such as the U.S.-Japan-Australia initiated Blue Dot Network or the commitments reached at the June 2021 G7 Summit.

## Conclusion

There is no doubt that the PRC's aggressive and illegal behavior at sea is a top concern for both the United States and Japan. However, to many of their Indo-Pacific coastal state partners, PRC actions that undermine maritime rule of law are of less concern than the threats posed by other dangerous maritime actors. Therefore, the shared priority should be on the coastal states' capability to safely administer and enforce laws in the waters under their responsibility. It is when facing criminal activities where the partners share the most immediate and most clearly converged interests with the United States and Japan. It is also a path to provide the coastal states with the overall maritime capacity that will instill them with the strength and confidence to push back against state-based threats to maritime governance.

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