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The Senkaku/Diaoyu Islands Dispute: The likely impact of any constitutional change by Japan on its relations with China

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MAY 2016

VICE CHIEF OF THE DEFENCE FORCE
Australian Defence College
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Colonel Jennings attended the Australian Command and Staff College in 2004, followed by a posting to I (US) Corps. On his return to Australia, he was posted to Headquarters 1st Division. In December 2008, he deployed to Afghanistan as Deputy Commander of the US Afghan Regional Security Integration Command-South. In 2010, Colonel Jennings was appointed as the Commanding Officer of 6 RAR, which included deployment to Afghanistan as the Commanding Officer of Mentoring Task Force 1.

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Abstract

This paper examines the likely impact of any constitutional change by Japan on its relations with China, particularly in the context of the Senkaku/Diaoyu islands dispute. It notes that while several policy options have been canvassed as potential solutions to the dispute, none is seemingly palatable to one or both parties, suggesting that a long-term solution is not foreseeable, and that the potential for increased tension will remain.

The paper argues that while Japan's recent constitutional reinterpretation is not likely to impact the Senkaku/Diaoyu dispute, any change to allow a more liberal use of Japan's military forces would likely result in increased regional tensions, particularly in terms of Japan's relations with China. The paper concludes that in the interests of maintaining a stable regional security environment, Japan—and other influential parties—need to be particularly cognisant of the risks involved in advancing any such proposal.

The Senkaku/Diaoyu Islands Dispute: The likely impact of any constitutional change by Japan on its relations with China

Introduction

Since 2010, there has been considerable tension between Japan and China over the Senkaku/Diaoyu islands in the East China Sea. A group of unoccupied islands and rocks, totalling an area of seven square kilometres, the Japanese-administered islands are 200 kilometres northeast of Taiwan and a similar distance southwest of Okinawa.¹ China also claims sovereignty of the islands. As a result of these competing sovereignty claims, there has been a longstanding territorial dispute between the two states which, over time, has escalated into a regional flashpoint.

This paper will firstly examine the impact of Japan's recent reinterpretation of Article 9 of its Constitution as it relates to collective self-defence. It will then argue that the Senkaku/Diaoyu dispute is a regional flashpoint that will continue unless changes to policy settings are made in both China and Japan. The paper will examine several policy options that have been canvassed, noting that none seems particularly palatable. Against that background, the paper will conclude that while Japan's recent constitutional reinterpretation is not likely to impact the Senkaku/Diaoyu dispute, any change to allow a more liberal use of Japan's military forces would likely result in increased regional tensions, particularly in terms of Japan's relations with China.

Revising Japan's security posture

Within a year of taking office, following a landslide majority election in December 2012, Prime Minister Shinzo Abe's Liberal Democratic Party government introduced several security initiatives intended to strengthen Japan's regional security posture and provide a revised strategic framework for the Japan Self-Defense Forces (JSDF).² These initiatives reflected an iterative progression by successive Japanese governments to move away from the restrictive interpretations of Japan's 1951 Constitution, which specifically renounces war and prohibits Japan from maintaining the potential for war by denying the right of belligerency to the nation.³

The shift stems in part from a resurgence of Japanese nationalism but also from US pressure for Japan to contribute more both to international security and the US-Japan alliance.⁴ Put simply, the US would prefer Japan to become a 'normal' state and move away from the pacifist basis of its Constitution. In July 2014, Prime Minister Abe announced further measures, notably cabinet approval of a reinterpretation of the Japanese Constitution, aimed at allowing the JSDF to participate in collective self-defence measures.⁵

The right to self-defence was not excluded by the 1951 Constitution. Indeed, its constitutional basis was used by Prime Minister Yoshida in 1954 to establish the JSDF as a military force for defensive purposes.⁶ At the same time, Prime Minister Yoshida limited the expectations of his US ally by announcing that Article 9 did not permit participation in collective self-defence arrangements or the use of the JSDF internationally.⁷ That interpretation, in the context of the 1951 Security Treaty between the US and Japan, formed the basis for what became known as the 'Yoshida doctrine'.⁸

The July 2014 reinterpretation of Article 9 is therefore significant in that it supplanted the 60-year-old Yoshida doctrine, allowing the JSDF to take action in support of an ally that has come under military attack.⁹ The reinterpretation does not alter the primacy of self-defence but expands on the standards whereby the JSDF may use force should an ally of Japan be attacked.¹⁰ These standards were further codified in Japan's 2015 Defence White Paper, articulating the conditions that must be met before the use of force in collective self-defence can be authorised.¹¹

The constitutional reinterpretation provoked criticism from China and South Korea, based on lingering resentment of Japanese aggression in World War 2.¹² However, while the changes are

significant in terms of Japanese security policy, the use of force is still heavily constrained and does not reflect a normative defence policy, not least because of Article 9's continuing denial of the right of belligerency.¹³ Any fundamental change towards a normative policy could arguably only come about as a result of constitutional amendment.

Prime Minister Abe has mooted that possibility. However, he has yet to table any such change, which would likely be strongly contested domestically.¹⁴ Hence, it can be argued that notwithstanding the rhetoric from China and South Korea, Japan's new collective self-defence powers do not alter the strategic calculus for regional disputes. Any future move to alter the Constitution, however, would likely have significant ramifications.

The flashpoint of the Senkaku/Diaoyu islands

The origins of the Senkaku/Diaoyu islands dispute stem from the end of the Sino-Japanese War in May 1895, when China ceded Taiwan and its surrounding islands to Japan under the Treaty of Shimonoseki.¹⁵ In 1969, a geophysical report highlighted the potential for oil reserves in the East China Sea, sparking a revival of the dispute, with subsequent territorial claims by China and Taiwan.¹⁶ These claims were ignored by Japan, which continued to administer the islands, establishing a *status quo* whereby Japan has ignored Chinese claims for sovereignty.¹⁷

This *status quo* was reinforced when Chinese Vice Premier Deng Xiaoping visited Japan in 1978, signing the 'Sino-Japanese Peace and Friendship Treaty', and agreeing a *modus vivendi* whereby the sovereignty dispute would be shelved for future generations to solve.¹⁸ The agreement implicitly removed any justification for a Chinese challenge to Japanese control of the islands, which Japan interpreted as implicit recognition of Japanese sovereignty.¹⁹

In the following years, a number of small-scale incidents in the vicinity of the islands periodically sparked diplomatic tensions between China and Japan.²⁰ However, these incidents were successfully managed through diplomatic dispute resolution arrangements, while domestic actions in both countries to thwart excessive nationalism were able to maintain the spirit of the *modus vivendi*.

However, the equation changed dramatically in 2012, when the Japanese Government decided to purchase three of the islands, effectively nationalising the islands. This resulted in escalatory measures by the Chinese, turning the *status quo* on its head and elevating the Senkaku dispute to a regional flashpoint.²¹ In an official paper released in 2012, China asserted that:

China has maintained routine presence and exercised jurisdiction in the waters of Diaoyu Dao....
China has also exercised administration over Diaoyu Dao and the adjacent waters.²²

Continuing incidents, together with China's establishment of an air defence identification zone (ADIZ) in the airspace around the islands, show that China's reaction to the nationalisation of the islands signals a clear departure from its previous policy.²³ China is now openly challenging the Japanese claim to both sovereignty and administration of the islands, which has included a formal claim lodged with the UN.²⁴ For its part, Japan's official response to China's ADIZ has been more cautious, with its 2015 Defence White Paper saying that 'Japan is demanding China to revoke any measures that go against the principle of the freedom of overflight over the high seas'.²⁵

The current situation is characterised by policy settings that have had the effect of heightening tensions between China and Japan, with a commensurate increase in the risk of miscalculation following any incident at sea or in the air. If not managed well, the consequences of any such incident are obviously significant. The possibility of an imbroglio escalating into conflict cannot be dismissed, with the potential also to draw in the US in defence of its ally.²⁶

The options for resolution

In order to manage the current tense situation, characterised by heightened tension and the attendant risk of miscalculation, there is a need for Japan and China to continue to develop crisis

management mechanisms. This is especially apparent given that the recently-declared Chinese ADIZ overlaps a Japanese ADIZ, declared in 1969.²⁷

At present, there are two mechanisms with the potential to assist in times of crisis, namely the 2014 Code for Unplanned Encounters at Sea (reached at the 2014 Western Navies Symposium and now agreed by 21 countries) and the nascent China-Japan Maritime Mechanism (proposed by Japan but not yet agreed by China).²⁸ However, such mechanisms are only useful to treat the symptoms of the problem—they do not address the underlying, structural issues at the heart of the dispute.

There are four broad options that have been canvassed regarding the structural issues. The first is essentially aligned to the *modus vivendi*, which would see the competing claims of sovereignty put aside for resolution at a later time. However, in order to reduce tensions to pre-2012 levels, it is likely that China would require Japan to recognise its own sovereignty claims that were made in response to Japan's purchase of the islands in 2012.²⁹ That is unlikely to be agreed by the Japanese government, which believes that its own claim has a sound basis in international law. It would also likely attract negative domestic comment in Japan, especially given the growing sense of Japanese nationalism and public antipathy towards China.³⁰

The second option would be to seek resolution of the respective sovereignty claims through international arbitration, such as the International Court of Justice (ICJ). This option could be pursued by Japan, as it is a signatory to the Court's jurisdiction. However, China does not recognise the compulsory jurisdiction of the ICJ, and is unlikely to accept any decision relating to competing sovereignty claims.³¹ So while this option may seem appealing, it would require a major concession on the part of both countries—China to recognise the jurisdiction of the ICJ, and Japan to acknowledge the existence of China's claim—which is unlikely for the foreseeable future.

The third option would be for Japan to use its generally-accepted administration of the Senkaku Islands to declare the region an international marine park, as proposed by Taiwan's President Ma Ying-jeou in 2012.³² Such an option would be attractive internationally, particularly as it would ban the exploitation of seabed resources, which is an underlying element of the competing claims. However, there has been no indication that either China or Japan would agree to such a proposal, and it seems unlikely that either could be persuaded to put aside their claims in favour of such a park, despite some thawing in tensions following the meeting between Japan's Prime Minister and China's President in November 2014.³³

The fourth option would be a revival of the stalled 2008 China-Japan Consensus on Resource Development.³⁴ At the time, the agreement was effective in gaining concessions from both parties, including agreement on joint resource development in the immediate vicinity of the islands. However, later incidents and disagreements soured the prospect of further collaboration. Nevertheless, this initiative has the potential to be revived, and could provide worthwhile follow-on initiatives, in an attempt to restore the conditions that existed before 2012.

Conclusion

This paper has argued that without treating the structural issues associated with the Senkaku dispute, there can be no long-term solution, and that the potential for increased tension will remain. The four policy options canvassed in this paper should not be viewed as absolute. Indeed, *realpolitik* on behalf of both countries will most likely mean that none of the options will be palatable and that a different path will have to be trod.

Regardless, there is a real need to return to a pre-2012 environment where disputes were handled without resort to escalatory measures. The November 2014 bilateral discussions between Prime Minister Abe and President Xi, which included specific agreements for improving Japan-China relations, were a promising first step, with indications that further talks may have a de-escalating effect.³⁵

For Japan, the path to becoming a ‘normal’ security actor through constitutional change is fraught with risk, both domestically and in terms of regional stability. Should Prime Minister Abe table any proposal for constitutional reform prior to de-escalation of the Senkaku dispute, China’s reaction would likely be ardent and escalatory. In the interests of maintaining a stable strategic environment in the East China Sea and the broader Northeast Asia region over the coming decade, Japan—and other influential parties—need to be particularly cognisant of the risks involved in advancing any such proposal.

Notes

- 1 James Manicom, *Bridging Troubled Waters: China, Japan and maritime order in the East China Sea*, Georgetown University Press: Washington DC, 2014, pp. 1-2.
- 2 William Choong, 'Japan's new politics', *Survival*, Vol. 55, No. 3, June-July 2013, pp. 47-54.
- 3 Law Library of Congress, *Japan: Interpretations of Article 9 of the Constitution*, Global Legal Research Center, Washington DC, September 2015, p. 2.
- 4 For example, see the explanation of the process of Japan's 'gradual normalisation' in William Choong, 'Defence and Japan's constitutional debate', *Survival*, Vol. 57, No. 2, April-May 2015, pp. 173-92.
- 5 Prime Minister Shinzo Abe, 'Press conference by Prime Minister Abe', *Prime Minister of Japan and his Cabinet* [website], 1 July 2014, available at <http://japan.kantei.go.jp/96_abe/statement/201407/0701kaiken.html> accessed 24 May 2016. While Article 51 of the UN Charter defines collective self-defence, this paper uses William Choong's definition of collective self-defence as 'generally understood to be the right to use force to repel an armed attack against a foreign country that has a close relationship with one's own country': Choong, 'Defence and Japan's constitutional debate'.
- 6 Choong, 'Defence and Japan's constitutional debate', p. 176.
- 7 See [US] Library of Congress, 'Japan: Article 9 of the Constitution', *Library of Congress* [website], subsection V(F), 'Birth of SDF', available at <<https://www.loc.gov/law/help/japan-constitution/article9.php> accessed 24 May 2016>; also Choong, 'Defence and Japan's constitutional debate', p. 176.
- 8 Choong, 'Defence and Japan's constitutional debate', p. 176.
- 9 Choong, 'Defence and Japan's constitutional debate', p. 179-81.
- 10 Choong, 'Defence and Japan's constitutional debate', p. 176. See also Adam Liff, 'Japan's defense policy: Abe the evolutionary', *The Washington Quarterly*, Vol. 38, No. 2, Summer 2015, pp. 86-7. At page 94, Liff also points out that Japan's exercise of collective self-defence is a political judgment and is likely to occur only when Japan's security is also threatened. He also notes that the US-Japan alliance is not a mutual defence pact.
- 11 Japanese Ministry of Defense, 'Defense of Japan 2015, Part II: Japan's security and defense policy and the Japan-US Alliance (White Paper)', *Ministry of Defense* [website], available at <http://www.mod.go.jp/e/publ/w_paper/2015.html> accessed 24 May 2016.
- 12 See, for example, Stephen McDonnell, 'China criticises Japan's revision of pacific constitution', *ABC News* [website], 2 July 2014, available at <<http://www.abc.net.au/news/2014-07-02/china-slams-japan-military-shift/5565630>> accessed 24 May 2016; also Vasedevan Sridharan, 'Xi and Park criticise Japan's departure from pacific doctrine', *International Business Times* [website], 4 July 2014, available at <<http://www.ibtimes.co.uk/xi-park-criticise-japans-departure-pacifist-doctrine-1455346>> accessed 24 May 2016.
- 13 Liff, 'Japan's defense policy', p. 95.
- 14 Law Library of Congress, *Japan*, pp. 41-9; Liff, 'Japan's defense policy', pp. 91-2.
- 15 Mark E. Manyin, *Senkaku (Diaoyu/Diaoyutai) Islands Dispute: US treaty obligations*, Congressional Research Service: Washington DC, January 2013, p. 2.
- 16 Manicom, *Bridging Troubled Waters*, pp. 43-4.
- 17 Manicom, *Bridging Troubled Waters*, pp. 43-4.
- 18 See Ministry of Foreign Affairs of Japan, 'Treaty of Friendship and Peace between Japan and China', *Ministry of Foreign Affairs of Japan* [website], available at <<http://www.mofa.go.jp/region/asia-paci/china/treaty78.html>> accessed 24 May 2016; and Manicom, *Bridging Troubled Waters*, pp. 45-6. Manicom also highlights that the *modus vivendi* was effectively already Chinese policy.
- 19 Manicom, *Bridging Troubled Waters*, pp. 44-6.
- 20 Yew Meng Lai, *Nationalism and Power Politics in Japan's Relations with China: A neoclassical realist interpretation*, Routledge: Abingdon, 2014, pp. 157-61.
- 21 See, for example, Jane Perlez, 'China accuses Japan of stealing after purchase of group of disputes islands', *New York Times* [website], 11 September 2012, available at

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- <http://www.nytimes.com/2012/09/12/world/asia/china-accuses-japan-of-stealing-disputed-islands.html?_r=0> accessed 24 May 2016.
- 22 The People's Republic of China, 'Diaoyu Dao: an inherent territory of China (White Paper)', *Information Office of the State Council* [website], 25 September 2012, available at <http://www.china.org.cn/government/whitepaper/node_7168681.htm> accessed 24 May 2016.
- 23 Michael McDevitt, 'The East China Sea: the place where Sino-US conflict could occur', *American Foreign Policy Interests*, Vol. 36, No. 2, 2014, pp. 102-3.
- 24 McDevitt, 'The East China Sea', pp. 102-3.
- 25 Japanese Ministry of Defense, 'Defense of Japan 2015, Part I: Security environment surrounding Japan (White Paper)', *Ministry of Defense* [website], available at <http://www.mod.go.jp/e/publ/w_paper/2015.html> accessed 24 May 2016.
- 26 The US takes a neutral position on the competing sovereignty claims but has made clear that the islands are part of the mutual treaty obligations to Japan: Manyin, *Senkaku (Diaoyu/Diaoyutai) Islands Dispute*, pp. 5-6.
- 27 Tetsuo Kotani, 'Crisis management in the East China Sea', *Stockholm International Peace Research Institute (SIPRI)*, [website], p. 6, available at <http://books.sipri.org/product_info?c_product_id=491> accessed 24 May 2016.
- 28 Oliver Bräuner, Joanne Chan and Fleur Huijskens, 'Confrontation and cooperation in the East China Sea: Chinese perspectives', *SIPRI* [website], pp. 4-7, available at <http://books.sipri.org/product_info?c_product_id> accessed 24 May 2016.
- 29 McDevitt, 'The East China Sea', p. 104; see also Michael D. Swaine, 'Chinese views regarding the Senkaku/Diaoyu islands dispute', *China Leadership Monitor*, No. 41, Spring 2013, pp. 4-5.
- 30 Noboru Yamaguchi, 'A Japanese perspective on the Senkaku/Diaoyu islands crisis', *Lowy Institute* [website], pp. 15-6, available at <http://www.lowyinstitute.org/files/tensions_in_the_east_china_sea_web.pdf> accessed 24 May 2016.
- 31 China is not on the list of countries recognising the compulsory jurisdiction of the Court: see International Court of Justice (ICJ), 'Declarations recognizing the jurisdiction of the Court as compulsory', *ICJ* [website], available at <<http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3>> accessed 24 May 2016.
- 32 See, for example, *Taipei Times*, 'Annette Lu makes Diaoyutais proposal during visit to US', *Taipei Times* [website], 9 April 2003, available at <<http://www.taipeitimes.com/News/taiwan/archives/2013/04/09/2003559183>> accessed 24 May 2016.
- 33 See, for example, Leika Kihara and Sui-Lee Wee, 'China's Xi, Japan's Abe hold landmark meeting', *Reuters* [website], 10 November 2014, available at <<http://www.reuters.com/article/us-china-japan-idUSKCN0IU08420141110>> accessed 24 May 2016.
- 34 Details of the agreement are available on the National University of Singapore's website, <<https://cil.nus.edu.sg/rp/il/pdf/2008%20China-Japan%20Principled%20Consensus%20on%20the%20East%20China%20Sea%20Issue-pdf.pdf>> accessed 24 May 2016; see also Bonnie Glaser, 'US policy considerations in the Senkaku/Diaoyu islands crisis', *Lowy Institute* [website], pp. 35-6, available at <http://www.lowyinstitute.org/files/tensions_in_the_east_china_sea_web.pdf> accessed 24 May 2016.
- 35 Ministry of Foreign Affairs of Japan, 'Regarding discussions toward improving Japan-China relations', *Ministry of Foreign Affairs of Japan* [website], November 2014, available at <http://www.mofa.go.jp/a_o/c_m1/cn/page4e_000150.html> accessed 3 March 2016.



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