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The 1997 Deregulation of Japan's Holding Companies

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THE 1997 U.S.-JAPAN DEFENSE GUIDELINES UNDER THE JAPANESE CONSTITUTION AND THEIR IMPLICATIONS FOR U.S. FOREIGN POLICY

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Abstract: The 1997 U.S.-Japan Defense Guidelines represent additional commitment by Japan to the U.S.-Japan security alliance, the primary source of Northeast Asian security and stability. Certain tasks within Japan's enhanced role raise questions of whether the Guidelines are compatible with Article 9 of Japan's Constitution. On its face, Article 9 renounces Japan's right to wage war or maintain military force, yet it has been interpreted to allow a defensively-oriented, though massive, military. Based on the existing interpretation of Article 9, it is likely that Japan will declare its new role under the Guidelines constitutional. U.S. policy toward Japan in the short-term is to clarify the division of roles in the alliance to stabilize Northeast Asia. This Comment argues that the U.S. security guarantee prevents Japan from acting like a self-sufficient country. Consequently, U.S. long-term policy should be to withdraw from the role of Japan's protector wherever possible to encourage Japan to act more like a leader internationally.

I. INTRODUCTION

The relationship between the United States and Japan is typically viewed in economic terms. However, although much less visible, their defense relationship is at least as important.[1] As part of their developing post-cold war security strategy, in September 1997 the United States and Japan announced[2] updates to the 1978 Defense Guidelines.[3] The 1997 Guidelines[4] revise each partner's respective roles in coordinated responses to military conflict in Northeast Asia. Their primary purpose is to clarify the

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[1] *See* Takuma Takahashi, *Economic Interdependence and Security in the East Asia-Pacific Region*, *in* TOWARD A TRUE ALLIANCE 96, 124-27, (Mike Mochizuki ed., 1997).

[2] U.S.-JAPAN SECURITY CONSULTATIVE COMMITTEE, COMPLETION OF THE REVIEW OF THE GUIDELINES FOR U.S.-JAPAN DEFENSE COOPERATION (1997), *available in* Japan Self Defense Forces Web Page <http://www.jda.go.jp/policy/f_work/sisin4_.htm> [hereinafter COMPLETION OF THE REVIEW].

[3] THE DEFENSE AGENCY, JAPAN, GUIDELINES FOR JAPAN-U.S. DEFENSE COOPERATION (1978), *in* DEFENSE OF JAPAN 1979 (WHITE PAPER) 187-93 (MAINICHI DAILY NEWS trans., 1979) [hereinafter 1978 GUIDELINES].

[4] U.S.-JAPAN SECURITY CONSULTATIVE COMMITTEE, THE GUIDELINES FOR U.S.-JAPAN DEFENSE COOPERATION (1997), *available in* Japan Self Defense Forces Web Page <http://www.jda.go.jp/policy/f_work/sisin4_.htm> [hereinafter 1997 GUIDELINES].

partners' relationship under the 1960 U.S.-Japan Security Treaty[5] which has been the United States' foundation for security in Asia since the end of World War II.[6] Under the new Guidelines, Japan's role in joint U.S.-Japan military operations marks not only an increased level of defense burdensharing for Japan,[7] but also a move toward taking greater responsibility for its own defense.

On another level, the public nature of the U.S.-Japan announcement indicates a more strategic purpose of the Guidelines. That is, the 1997 Guidelines are intended to help stabilize the political tension in the Taiwan Straits and the Korean Peninsula.[8] These two regions have the greatest potential for full-scale war anywhere in the world because they are home to the only countries still divided after WWII.

Currently, the U.S. security guarantee prevents Japan from acting like a self-sufficient country. The new Guidelines appear to be one step in many toward a long-term strategic policy which shifts security responsibility from the U.S. to Japan, a shift which observers see someday leading to Japan acting more as an equal partner to the U.S in international security matters.[9]

Whether Japan can implement domestic legislation allowing it to perform its expanded military role under the Guidelines, however, has yet to be decided. On its face, Article 9 of the Japanese Constitution[10] prohibits the use of aggression to settle international disputes.[11] Thus, whether Japan interprets its constitution in a way that permits it to engage in defensive military force outside the immediate confines of the Japanese archipelago, as agreed in the 1997 Defense Guidelines, has broad implications for U.S. foreign policy in Northeast Asia.

Part II of this Comment begins by explaining the cold war background from which the Defense Guidelines originated. Part III examines the

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[5] Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Jan. 19, 1960, U.S.-Japan, 11 U.S.T. 1632 [hereinafter 1960 Treaty].

[6] William Cohen, U.S. Secretary of Defense, Prepared Statement before the Asia Society, June 11, 1997, at 3, *available in* U.S. Department of Defense, *DefenseLINK*, <http://www.defenselink.mil>.

[7] Robert Manning, *U.S., Japan Deepen Defense Ties—and China Gets Nervous*, LOS ANGELES TIMES, Sept. 28, 1997.

[8] *Id.*

[9] Mike Mochizuki, *A New Bargain for a Stronger Alliance*, *in* TOWARD A TRUE ALLIANCE, *supra* note 1, at 5, 7 [hereinafter Mochizuki, *New Bargain*].

[10] KENPO [CONSTITUTION], art. 9. The English translation of Japan's constitution cited in this Comment is the U.S. State Department version. DEPARTMENT OF STATE, THE CONSTITUTION OF JAPAN, PUBLICATION 2836, FAR EASTERN SERIES 22 (1947).

[11] KENPO [CONSTITUTION], art. 9; Kendrick Royer, *The Demise of the World's First Pacifist Constitution: Japanese Constitutional Interpretation and the Growth of Executive Power to Make War*, 26 VAND. J. TRANSNAT'L L. 749, 752 (1993).

treatment of Article 9 by Japan's judiciary, its political leadership, and Japan's public. Part IV discusses the need for the 1997 Guidelines, examines their content, and then predicts that Japan will ultimately declare its role under the Guidelines to be constitutional. Finally, this Comment explains recent developments in Northeast Asia, and then makes recommendations for U.S. foreign policy depending on whether Japan declares the new Guidelines constitutional. This Comment concludes by arguing that the U.S. will be able to rely upon Japan for performance of its Guidelines role. U.S. foreign policy should be to withdraw from the role of Japan's protector wherever possible so that Japan can assume the roles and responsibilities of a world leader.

II. THE COLD WAR

During the cold war, the U.S.-Japan security alliance not only contributed to the downfall of the Soviet Union[12] and kept a check on Chinese expansion,[13] it also permitted the steep and unfettered rise of Japan as a global economic superpower.[14] Together, the U.S.-Japan alliance in Northeast Asia and the North Atlantic Treaty Organization ("NATO") in Western Europe made up the respective eastern and western components of the U.S. policy of containment which was designed to deter the Soviet Union and China.[15] Coordination between these two sets of allies reached its peak during the Korean and Vietnam wars.[16] The U.S. postwar occupation of Japan permitted the U.S. to position Japan, a former enemy, as a U.S. ally in the cold war.[17]

The Defense Guidelines and the U.S.-Japan Security Treaty they clarify grew out of a relationship born from the necessities of the cold war.[18]

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[12] *See* Seizaburo Sato & Yuji Suzuki, *A New Stage of the United States-Japan Alliance, in* SHARING WORLD LEADERSHIP? 153, 154-55, 166 (John Makin & Donald Hellmann eds., 1989).

[13] *See id.* at 156-57.

[14] Donald Hellmann, *The Imperatives for Reciprocity and Symmetry in U.S.-Japanese Economic and Defense Relations, in* SHARING WORLD LEADERSHIP?, *supra* note 12, at 237, 237-38.

[15] J.W. DOWER, EMPIRE AND AFTERMATH: YOSHIDA SHIGERU AND THE JAPANESE EXPERIENCE 1878-1954, at 419 (1979).

[16] KENNETH PYLE, THE JAPANESE QUESTION: POWER AND PURPOSE IN A NEW ERA 25, 34-35 (2d ed. 1996). Japan served as the primary staging area and goods supplier for the U.S. to conduct its wars on the Korean peninsula and in Vietnam. *Id.*

[17] *Id.* The Containment Doctrine was the U.S. global cold war security strategy intended to defeat communism. Its central premise was that the combined military power of the U.S. and its allies was insufficient to defeat the military power of communist countries. Therefore, the U.S. should attempt only to contain further expansion of communism and wait for it to collapse of its own accord. *See* STEPHEN AMBROSE, RISE TO GLOBALISM: AMERICAN FOREIGN POLICY SINCE 1938 182, 214, 264 (4th ed. 1985).

[18] *Id.*

The U.S. would defend Japan in exchange for Japan's willingness to provide the U.S. access to military bases in Japanese territory.[19]

This one-way U.S. guarantee of Japan's security, where Japan commits to little in return for the U.S., has been referred to as the "political greenhouse."[20] During the cold war, the U.S. shielded Japan not only from the military threats from the Soviet Union and China as well as the associated economic costs of not having to participate in either the Korean or Vietnam Wars as many other countries did, but also from the social and psychological strain that accompanies decisions of whether to commit troops to United Nations peace-keeping activities or other world conflicts.[21] From the end of WWII until after the Persian Gulf War, Japan did not participate in any U.N operation.[22]

An important effect of the U.S. security guarantee was the placation of Japan's neighbors who were fearful of a reemergence of Japan's fascist and expansionary past.[23] Because of the long standing dominance of the U.S. in this security alliance, the U.S. was in a position to closely monitor Japan's military capabilities. Consequently, Japan's neighbors were somewhat reassured Japan would not invade their countries again.[24] In addition, Japan benefited economically: with national defense safely aside, Japan was free to concentrate its society's entire productivity on commercial ventures.[25]

III. ARTICLE 9 OF THE JAPANESE CONSTITUTION

The legal basis for Japan's abstention from security matters during the cold war is Article 9 of the Japanese Constitution.[26] Article 9 states:

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[19] Mochizuki, *New Bargain, supra* note 1, at 7.

[20] Hellmann, *supra* note 14, at 237.

[21] *See id.*

[22] The first U.N. peacekeeping operation Japan participated in was the non-combatant 1992 Cambodian election monitoring. *See infra* note 106.

[23] Mochizuki, *New Bargain, supra* note 1, at 6.

[24] PYLE, *supra* note 16, at 23-24.

[25] *Id.* at 122. Prime Minister Yoshida Shigeru implemented policies and programs that institutionalized Japan's stance domestically and enabled it to receive continued security protection from the U.S. *Id.* at 25. Kenneth Pyle, Professor of History and Asian studies at the Jackson School of International Studies, University of Washington (former Director), refers to these policies as "the Yoshida Doctrine." *Id.* In addition to allowing Japan's conservative political leadership control for over forty years, the Doctrine also permitted Japan's leaders to shrewdly avoid any substantial international commitment that did not further their own narrowly-defined goals of economic reconstruction and competitiveness. *Id.* at 25-26, 34, 43.

[26] KENPO [CONSTITUTION], art. 9.

> The Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. [L]and, sea, and air forces, as well as other *war potential*, will never be maintained. The right of belligerency of the state will not be recognized.[27]

This provision controls the use of Japan's military force by limiting the actions in which Japan's Self-Defense Forces ("SDF") may engage as well as the international military agreements into which Japan may enter.[28] Thus, to be implemented, the Guidelines must be consistent with Article 9.

Because there has been intense and continuing debate in Japan over the meaning of Article 9, the question of who interprets the constitution in Japan is often raised.[29] As in other countries, the Japanese Supreme Court has this duty.[30] However, the Japanese Supreme Court has ruled that the interpretation of Article 9 is a political question.[31] The Court has deferred to the Diet, Japan's Parliament, to give Article 9 meaning, while reserving the right to intervene should that meaning clearly exceed constitutional norms.[32]

Thus, the interpretation of Article 9 determines whether Japan can honor its commitments to the U.S. as enumerated in the 1997 Defense Guidelines. This interpretation depends on legal,[33] political,[34] and social factors.[35] This combination of forces will affirm or deny the constitutionality of the 1997 Defense Guidelines.

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[27] *Id.* (emphasis added).

[28] LAWRENCE W. BEER & HIROSHI ITOH, THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970-1990, at 30 (1996). The SDF is composed of air, ground, and naval defensively-oriented forces. In accordance with Article 9, the only armaments they may possess may be defensive in nature. For example, a fighter jet may have guns, but no bombs.

[29] James Auer, *Article Nine: Renunciation of War*, *in* CONSTITUTIONAL LAW IN JAPAN 69, 74-76 (Piercy Luney ed., 1993); *see also* Theodore McNelly, *Foreword* to OSAMU NISHI, THE CONSTITUTION AND THE NATIONAL DEFENSE LAW SYSTEM IN JAPAN 1 (1987).

[30] KENPO, *supra* note 10, art. 81.

[31] For a detailed analysis of these rulings, *see infra*, discussion beginning at note 37, and accompanying text.

[32] *See infra*, discussion beginning at note 37, and accompanying text

[33] Kisaburo Yokota, *Political Questions and Judicial Review: A Comparison*, 43 WASH. L. REV. 1031, 1052-54 (1967-68).

[34] PYLE, *supra* note 16, at 124.

[35] Robert Dekle, *The Relationship Between Defense Spending and Economic Performance in Japan*, *in* SHARING WORLD LEADERSHIP?, *supra* note 12, at 127, 132-33.

A. Article 9 as Defined by Japan's Judiciary

The first factor in the interpretation of Article 9 is Japan's judiciary. The Japanese Supreme Court has refused to rule on the constitutionality of the SDF and Japan's use of force.[36] Instead, it has repeatedly deferred to Japan's Diet and legislative body providing only broad boundaries. This section discusses three judicial decisions which illustrate the Japanese Supreme Court's interpretation of Article 9 as a political issue.

1. The Sunakawa Case

In 1959, the Supreme Court heard a case brought by land owners against a Japanese radical group that had destroyed fences and interfered with a survey of private property within Tachikawa Air Base, then used by the U.S. military.[37] The defendants argued that the U.S.-Japan Security Treaty, under which U.S. use of the base was authorized, was unconstitutional.[38] The Court held that self-defense was an inherent sovereign right, but avoided specifically ruling on the legality of war potential for self-defense, or, more specifically, the legality of the SDF.[39] The Court instead declared that the constitutionality of the SDF was a political issue and should be relegated to the Diet.[40] This deferral set the tone for later rulings.

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[36] Auer, *supra* note 29, at 80-82; Tomosuke Kasuya, *Constitutional Transformation and the Ninth Article of the Japanese Constitution*, 18 L. JAPAN 1, 21 (Paul Taylor trans., 1985); Robert B. Funk, *Japan's Constitution and U.N. Obligations in the Persian Gulf War: The Case for Non-Military Participation in U.N. Enforcement Actions*, 25 CORNELL INT'L L.J. 363, 381-82 (1992).

[37] Judgment of Dec. 16, 1959 (Japan v Sakata, Sup. Ct., G.B.), 13 SAIKŌ SAIBANSHO KEIJI HANREISHU 3225, *translated in* 4 SERIES OF PROMINENT JUDGEMENTS OF THE SUPREME COURT UPON QUESTIONS OF CONSTITUTIONALITY 2, 3-4, 6 (1960); Auer, *supra* note 29, at 80; Funk, *supra* note 36, at 380-81.

[38] Auer, *supra* note 29, at 80.

[39] *Id.* at 80-81; Funk, *supra* note 36, at 380-81. The constitutionality of the SDF was challenged for the first time in the *Eniwa* case. *Id.* at 381 (citing Judgment of Oct. 8, 1952 (*Eniwa Case*, Sup. Ct.), 6 MINSHO 783). In that case, the prosecution argued that Japan's inherent right to self-defense, strongly implied later by *Sunakawa*, extended to the SDF. *Id.* The facts of the case involved two ranchers who cut telephone wires leading to a neighboring SDF base to disrupt training missions hoping to reduce the associated noise. *Id.* They were charged with damaging military equipment in violation of the SDF law. *Id.* The Sapporo District Court refused to extend *Sunakawa* to the SDF, and instead dismissed the case on ground that the ranchers' act did not constitute destruction of military property. *Id.*

[40] Yokota, *supra* note 33, at 1037-38.

2. *The Naganuma Nike Base Case*

In the *Naganuma Nike Base* case, the Defense Agency wanted to build a missile base on the island of Hokkaido as part of the 1967-1971 Defense Build-Up Program.[41] Local residents protested and brought legal action against the Ministry of Agriculture and Forestry.[42] In a surprise 1973 ruling, the Sapporo District Court[43] held that the SDF was comprised of military units and thus was unconstitutional.[44] The court ordered the Ministry to retract its permit, thus denying the Defense Agency's use of the forestry preserve.[45] Although the court affirmed Japan's right of self-defense as an independent state, the court stated that this right should be achieved through diplomacy, police action, revolution by the masses, confiscation of the property of citizens from aggressor nations, deportations, and other non-military measures.[46]

On appeal, the Sapporo High Court reversed the District Court on grounds that the plaintiff lacked standing.[47] The high court noted in *dicta,* however, that Paragraph 1 of Article 9 prohibits wars of aggression.[48] Since then, the *Naganuma* case has been construed to mean that the purpose, organization, formation, and equipment of the SDF do not indicate aggression.[49] Thus, an appellate court once again effectively held that compatibility of the SDF and Article 9 is a political question to the extent that the SDF and its mission are defensive. The Supreme Court implicitly affirmed by ignoring the merits.[50]

3. *The Hyakuri Base Case*

The most recent of the three cases challenging the constitutionality of the SDF is the *Hyakuri Base* case.[51] In 1976, a farmer sold his property to a private

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[41] Auer, *supra* note 29, at 80 (discussing Judgment of Sept. 9, 1982 (*Naganuma Nike Base Case*, Sup. Ct., 1982), 1054 HANREI JIHO 16); Osamu Nishi. *Article 9 of the Constitution and the Self-Defense Forces Law, in* THE CONSTITUTION AND THE NATIONAL DEFENSE LAW SYSTEM IN JAPAN 1, 20 (Osamu Nishi ed., 1987).

[42] Auer, *supra* note 29, at 80; *see also* Nishi, *supra*, note 41, at 20.

[43] Japanese High Courts are the equivalent of U.S. Federal Courts of Appeal.

[44] Nishi, *supra*, note 41, at 21.

[45] *Id.*

[46] Auer, *supra* note 29, at 16; Nishi, *supra* note 41.

[47] Auer, *supra* note 29, at 80.

[48] *Id.* at 81.

[49] *Id.*

[50] Auer, *supra* note 29, at 81.

[51] Nishi, *supra* note 41, at 23 (discussing Judgment of June 6, 1989 (*Hyakuri Base Case,* Sup. Ct.), 1318 HANREI JIHO 3).

buyer in order to oppose the construction of an air-defense missile base.[52] When the buyer failed to pay, the farmer changed his mind.[53] Along with the government, he sued for his proprietary right so that he could then sell to the government.[54] The Hyakuri District Court went further than any previous court, however, by stating that self-defense for the purpose of preventing foreign attack was constitutionally permissible.[55] The District Court found this narrowly-defined concept of self-defense was a legal, rather than a political issue.[56] The constitutionality of the SDF's mission, however, remained a political issue.[57] On appeal, the Tokyo High Court avoided the issue of constitutionality by categorizing the case in civil terms.[58] In 1989, the Supreme Court affirmed the Tokyo High Court's categorization of the case, holding that Article 9 "does not apply directly to private acts."[59]

These three cases show that the Japanese Supreme Court has developed a pattern of deferral to the legislature on Article 9 matters.[60] Since the Court has refused to hear subsequent cases and the Cabinet has not passed contravening legislation,[61] the Court's sole requirement for Article 9 is that the use of defensive force is constitutional.[62]

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[52] *Id.*

[53] *Id.*

[54] Auer, *supra* note 29, at 81.

[55] *Id.*

[56] *Id.* The court's decision stated:

> In effect, the use of the right of self-defense for the purpose of preventing and eliminating armed foreign attacks and for organizing and equipping effective and appropriate defense dispositions in advance does not violate Article 9 of the Constitution . . . [Article 9] does not renounce wars for the purpose of self-defense. Our nation holds the right to defend itself and to prevent and eliminate unjust foreign infringements. To exercise this right, proper defensive action must inevitably be taken.

Id. (citing Judgment of June 6, 1989 (*Hyakuri Base Case*, Supt. Ct.), 1318 HANREI JIHO 3).

[57] Auer, *supra* note 29, at 81. The court continued:

> The decision of whether the SDF exceed the necessary limits termed 'war potential' under paragraph 2, Article 9 is, in principle, not under the jurisdiction of the courts of justice unless it is clearly unconstitutional and invalid. This decision is primarily entrusted to the Diet, the body that legislated the two defense laws and is therefore ultimately responsible to the Japanese public.

Id. (citing Judgment of June 6, 1989 (*Hyakuri Base Case*, Supt. Ct.), 1318 HANREI JIHO 3).

[58] Nishi, *supra* note 41, at 24.

[59] Auer, *supra* note 29, at 82.

[60] Nishi, *supra* note 41, at 19.

[61] No rulings have overturned *Sunakawa*. Interview with John O. Haley, Director Asian Law Program, University of Washington (Feb. 3, 1998).

[62] Nishi, *supra* note 41, at 22.

B. Japan's Leadership and Its Interpretation of Article 9

The second factor in the interpretation of Article 9 is Japan's political leadership. Japan's political leadership continually balances the practical need for security with the ideological concerns of its population. On one hand, during the cold war the U.S. occupation of Japan after WWII temporarily removed the need for Japan to defend itself.[63] On other hand, the Korean War reminded Japan of its need for self-defense.[64] The public, however, remained strongly fearful of anything resembling a return to Japan's aggressive, expansionary, and fascist past.[65] This tension between practical and pacifist concerns has resulted in constant reinterpretation of Article 9.[66] In the end, Japan realized the U.S. security guarantee went a long way toward eliminating the need for practical concerns.[67] As mentioned earlier, Japan, unlike many other countries, did not have to participate in either the Korean or Vietnam wars. As a result, Japan was able to do something no powerful country had done before—entertain pacifism as a realistic notion. Pacifism was no longer philosophers' fare, it was the defense policy of Japan.[68]

1. The Postwar Origin of Article 9 and "War Potential"

Shortly after Japan's defeat in WWII, Prime Minister Yoshida addressed the issue of Japan's right to wage war. He noted that although under international law, Japan had the right to defend itself, but because of Article 9's restrictions he believed Japan still could not maintain armed forces even for the purpose of national self-defense.[69] Moreover, Yoshida believed that if Japan were attacked, it could rely on other countries for help.[70] Finally, he believed Japan could never begin to rebuild trust with its neighbors if it did not make dramatic gestures correcting its WWII aggression.[71]

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[63] PYLE, *supra* note 16, at 28.

[64] Royer, *supra* note 11, at 782.

[65] *Id.*

[66] JOHN MAKI, JAPAN'S COMMISSION ON THE CONSTITUTION: THE FINAL REPORT 260 (John Maki trans., ed., 1980).

[67] Mochizuki, *New Bargain*, *supra* note 1, at 6.

[68] Mike Mochizuki, *American and Japanese Strategic Debates*, *in* TOWARD A TRUE ALLIANCE, *supra* note 1, at 43, 66 [hereinafter *Strategic Debates*].

[69] Auer, *supra* note 29, at 74.

[70] *Id.* at 72.

[71] *Id.*

Yoshida changed his position soon thereafter, however, asserting Japan's right to self-defense. This change was made primarily to meet U.S. conditions for large-scale military aid.[72] In 1953, Yoshida indicated Article 9 was meant to prohibit "war potential" as a means of settling international disputes.[73] But, Article 9 did not prohibit the use of military power in self-defense.[74] By 1955, official Diet policy reflected this Article 9 "no war potential" interpretation:[75]

> The Constitution, while denouncing war, has not denounced war for self-defense...To check armed attack in [the] event of such an attack from outside is self-defense itself, and is entirely different from settling international disputes. Hence, the case of military power as a means of defending the nation when the nation has been attacked by [a] military power is not counter to [Article 9].[76]

The announcement of Japan's three non-nuclear principals followed.[77] The Cabinet pledged the government would not produce, possess, or permit nuclear weapons to be brought into Japan.[78]

The U.S.-Japan Treaty of Mutual Cooperation and Security took effect in 1960.[79] There was nothing mutual or even equitable about the Treaty, however.[80] The bargain, taken literally, was that America would protect

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[72] *Id.* at 75.

[73] *Id.* On December 12, 1954, the year in which the SDF was formally inaugurated, Defense Agency Director General Omura announced the Prime Minister Yoshida-inspired government view which has endured in one form or another since:

> The Constitution renounces war. However, it does not renounce wars for purpose of self-defense. Obstruction of armed interventions from abroad is in itself defense, and its essence differs from that of solving international disputes. Thus, defending the nation through the use of arms in cases of foreign attacks does not violate the Constitution. Article 9 recognizes the right of self-defense of Japan, an independent nation. Hence the SDF, whose mission is to defend the nation, and the establishment of a capable corps with the necessary limits to serve the purpose of self-defense do not violate the Constitution in any way.

Nishi, *supra* note 41, at 15, 55-57. Collective self-defense, that of coming to the aid of an ally in an armed conflict, does exceed the minimum limit, and is therefore interpreted to be unconstitutional. *Id.* at 12.

[74] *Id.* at 74-75.

[75] *Id.* at 76.

[76] *Id.* (citing K. MASUHARA, NIHON NO BOEI [JAPAN'S DEFENSE] 57, 58 (1961)).

[77] PYLE, *supra* note 16, at 33.

[78] *Id.*

[79] 1960 Treaty, *supra* note 5.

[80] Auer, *supra* note 29, at 76; 1960 Treaty, *supra* note 5, arts. V-VI.

Japan and in return Japan would provide political support and territory for U.S. military bases.[81] Article IV of the Treaty extended security cooperation with Japan to all of east Asia, and thus reveals the central U.S. reason for the agreement—the cold war.[82] Article V requires each party to assist the other in the event of an armed attack although, at the treaty's signing it was clear that Japan would do little or nothing in its own defense.

Yet, by the late-1980s, the Japanese government's "no war potential" interpretation of Article 9 had been utilized to increase Japan's SDF spending to the third largest defense budget in the world.[83] What was once a modest police force authorized by General MacArthur in the aftermath of Japan's defeat, almost thirty years later had become the technologically-sophisticated force that it is today.[84] This change stemmed from U.S. pressure on Japan to assume more of the burden for its own defense during the 1970 and '80s in response to the Soviet Union's massive increase in armaments.[85] The 1981 U.S.-Japan division of defense responsibilities meant Japan would patrol out to 1000 miles from its coasts.[86] This arrangement was not challenged further until the Persian Gulf War.

2. *Challenges to the Status Quo*

The 1990 Persian Gulf War both epitomized what had become Japan's characteristic approach to security matters and presented a challenge to the status quo.[87] Despite its near total dependence on the Gulf for oil, Japan refused to commit troops to a United Nations-endorsed, multinational military and peacekeeping operation conducted to keep the Gulf open.[88] This refusal engendered great international criticism.[89] Article 9 first had been interpreted as permitting self-defense to satisfy U.S. conditions for military protection, but in 1990 it was invoked to avoid involvement in conflicts of international

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[81] Mochizuki, *New Bargain, supra* note 1, at 7.

[82] 1960 Treaty, *supra* note 5, art. IV: "The Parties will consult together from time to time regarding the implementation of this Treaty, and, at the request of either Party, whenever the security of Japan or international peace and security in the Far East is threatened."

[83] Auer, *supra* note 29, at 77.

[84] *Id.* at 75,83.

[85] Nishi, *supra* note 41, at 4.

[86] Auer, *supra* note 29, at 77-78.

[87] PYLE, *supra* note 16, at 125.

[88] *Id.* at 15; Edward Balls, *Japan, Oil Is the Dominating Factor-Middle East*, FINANCIAL TIMES, July 15, 1991, at 10; Takahashi, *supra* note 1, at 107. *See generally* KEUN-WOOK PAIK, GAS & OIL IN NORTHEAST ASIA (1995).

[89] Akio Shibata, *Japanese Peacekeeping Legislation and Recent Developments in U.N. Operations*, 19 YALE J. INT'L L. 307, 309 (1994); PYLE, *supra* note 16, at 151.

importance.[90] The Gulf War threw the country into upheaval and forced Japan to confront the foreign policy issues it had evaded for so long.[91]

The ensuing debate centered on Japan's willingness to act in conjunction with other countries for promotion of international peace.[92] Some commentators suggested amending Article 9.[93] Opposition party and mainstream conservatives took the position that Article 9 prohibited the dispatch of the SDF abroad.[94] To oppose amending Article 9, the then-ruling Liberal Democratic Party ("LDP") played off the fears of Japan's pacifists by suggesting Japan would invade its neighbors again as in WWII if the SDF was ever sent abroad.[95] For example, Gotoda Masaharu, a senior LDP member, predicted that if Article 9 were amended, "all restraints would disappear."[96] A statement of pacifism, advocated by a conservative nationalist, shows the complexity of Article 9's meaning and the shrewdness of the LDP in playing competing political forces off of each other.[97]

The immediate result of the debate brought on by the Gulf War was a large monetary contribution by Japan to the American-led coalition, along with a token force of SDF minesweepers which helped sweep the Gulf after hostilities were over.[98] The government defended the constitutionality of the mission on the grounds that a formal cease-fire existed, and that the purpose of the mission to dispose of abandoned mines did not require the use of force.[99]

The government's long-term response to the international criticism it received was the 1992 Law Concerning Cooperation in U.N. Peacekeeping and Other Operations.[100] The law was a compromise between Japan's acknowledgement[101] of the need to support U.N. peace efforts and Article 9's prohibition of aggression.[102] In accordance with the "no war potential"

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[90] Auer, *supra* note 29, at 78.
[91] PYLE, *supra* note 16, at 127- 151-55.
[92] *Id.* at 127-31.
[93] *Id.*
[94] *Id.* at 124.
[95] *Id.* at 15.
[96] *Id.*
[97] *Id.*
[98] Shibata, *supra* note 89, at 316.
[99] *Id.*
[100] *Id.* at 308; Kokusai Rengo Heiwa Iji Katsudo Nado ni Taisuru Kyōryoku ni Kansuru Hōritsu [Law Concerning Cooperation in United Nations. Peacekeeping and Other Operations], Law No. 79 of 1992 [hereinafter Peacekeeping Law].
[101] Shibata, *supra* note 89, at 309.
[102] Peacekeeping Law. Peacekeeping, like humanitarian relief or election monitoring, does not require the use of force. *Id.* at 217.

interpretation of Article 9, the Peacekeeping Law allows SDF participation in U.N. peacekeeping assignments to prevent the recurrence of armed conflicts.[103] The SDF may only do so after conflict has ended.[104] SDF personnel must act with impartiality, and with the consent of the host country and the parties to the conflicts.[105] In carrying out their assignment, they can only be armed with "small-sized weapons."[106] Thus, in response to domestic and international pressure Japan's political leadership expanded the meaning of Article 9 to that of permitting the SDF to go abroad within self-defensive limits.

C. Japan's Electorate

Japan's populace is the third factor in the interpretation of Article 9. For example, elements of Japan's pacifist views were incorporated into the LDP's postwar security strategy as is evident from the continued resistance to all-out armament, the abstention from international power politics, and the rejection of nuclear weapons.[107] For over forty years much of Japan's electorate supported the defensive use of force expressed in the government's 1959 interpretation of Article 9.[108]

From a theoretical perspective, it is apparent that Article 9's interpretation has changed without formal amendment because of the popular acceptance of this notion.[109] One legal scholar postulates a citizen-led model of change:

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[103] Shibata, *supra* note 89, at 218.

[104] *Id.*

[105] *Id.* Had Iraq had not consented to the U.N. Iraq-Kuwait Observation Mission, the Peacekeeping Law may have prohibited SDF involvement.

[106] *Id.* at 232-33. In Articles XXII to XXIV of the Law Concerning Cooperation in U.N. Peacekeeping and Other Operations, "small-sized weapons" presumably means side arms.

To some, the conditions Japan has placed upon itself for participation in international peacekeeping efforts are at odds with the collective and cooperative spirit of U.N. operations. Shibata, *supra* note 89, at 332. After passing the Peacekeeping Law, Japan took a more active role in U.N. activities. It sent three electoral monitors to Angola to participate in the U.N. Angola Verification Mission, more than 680 personnel including a 600-member SDF ground unit to Cambodia to participate in the U.N. Transitional Authority in Cambodia, and a 48-member SDF transport unit to Mozambique to participate in the U.N. Operations in Mozambique. *Id.* at 308.

[107] PYLE, *supra* note 16, at 46.

[108] The *Sunakawa* decision discussed earlier remains the law and Japan has not seriously considered another interpretation. Haley, *supra* note 61.

[109] Royer, *supra* note 11, at 798.

> [T]here exists no legal method for deciding whether the effectiveness of a constitutional text has been lost; nor is there a legal method for demonstrating the legal confidence of the citizenry, which decides that actual situations have changed into new norms.[110]

Another states:

> If one asks who inevitably approves the value of norms, the answer is the citizenry. Transformation does not arise solely through interpretations by the Diet or the court; the Constitution can only be said to have transformed when the public awareness that approves these interpretations is settled.[111]

Others disagree as to the extent of public influence on the interpretation of Article 9.[112] Rather, they argue, the elites who have ruled Japan for over a century have had the greatest influence on the meaning of Article 9.[113] Even after their importance declined during the 1970s, paternalistic Japanese bureaucrats still wield great political and moral authority over the public.[114] At least up until the mid-1990s, the citizenry believed what their leaders told them about the meaning of Article 9.[115] Overall, however, Japan's populace has contributed to Article 9's interpretation by insisting on self-defensive limits for all security-related matters.

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[110] Kasuya, *supra* note 36, at 17. Kasuya refers to Naoki Kobayashi's transformation theory:

> The so-called "transformation" phenomenon occurs in one of two situations: (a) when an established condition or act, which constitutes an evasion of the law, is historically or sociologically necessary and, therefore, the conventional meaning of an applicable legal provision is lost and becomes unrealistic and unsuitable in the normative consciousness of the people; or, (b) when an irreversibly established condition continues to exist over a long period, the denial of which would plainly result in great social harm.

Id.

[111] Kasuya, *supra*, note 36, at 21 (discussing T. Fukase, *Kenpō no Heiwa Shugi to Saiban* [*The Constitution's Pacifism and the Court*], 35 KŌHŌ KENKYŌ 57 (1973)).

[112] PYLE, *supra* note 16, at 107. *See also* Gwen Robinson, *Japan Strains Grow Over Defense Pact*, FIN. TIMES, Sept. 27, 1997, at 4.

[113] PYLE, *supra* note 16, at 107.

[114] *Id.* at 107-11.

[115] Japan's once near-infallible bureaucrats are currently in discredit. *See Only 90 Government Corruption Cases in 1996*, JAPAN TIMES (Internet Edition), Dec. 29, 1997; *Osaka Reveals Abuse of 1.33 Billion Yen In Taxpayer's Funds*, JAPAN TIMES, Dec. 25, 1997; *Tokyo Avoids Disclosure of Dining Expenses*, JAPAN TIMES, Dec. 26, 1997.

D. Expression of the Legal Rule

The meaning of Article 9 depends on the three factors addressed above. Primarily, Article 9's meaning is a balance between Japan's disinclined Supreme Court, a government beset by domestic and international pressures, and a pacifist electorate. Article 9 is much more than a constitutional provision or legal principle. It is an entire *system* for Japan to sort out its use of military force. In the end, the provision says whatever the political consensus says it means depending on the circumstances at any point in time. As a result, Article 9 will be interpreted broadly enough to address new threats to Japan's territorial security as they arise. The 1997 Guidelines respond to military threats to Japan and therefore must be assessed according to the terms of Article 9.

IV. THE 1997 DEFENSE GUIDELINES

A. Provisions

The 1960 Treaty provides for subsequent agreements, such as the 1997 Guidelines, to address contemporary issues.[116] In 1978, the major issue in the alliance was budgetary.[117] This issue resulted in the first set of Guidelines.[118]

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[116] 1960 Treaty, *supra* note 5, art. VI.

[117] Henry Scott-Stokes, *Japan Will Pay More of the Cost of Keeping U.S. Military There*, NEW YORK TIMES, Nov. 10, 1978, at A4. Up until 1978, the U.S. provided for Japan's security by assuming two-thirds of the bill. *New Action Guidelines, Japan, U.S. Okay New Action Guidelines*, JAPAN TIMES, Nov. 28, 1978.

[118] 1978 Guidelines, *supra* note, 3; *New Action Guidelines*, *supra* note 117. The 1978 Guidelines marked a change in this policy to a more equitable distribution of the growing monetary costs of housing American troops on Japanese territory. *Id.* Japan still was not asked to assume anything near a credible, self-reliant posture of self-defense, however. *Id.* Primarily, the 1978 Guidelines outlined a way for Japan to begin paying for its share of the sky-rocketing cost of strategic defense. Scott-Stokes, *supra* note 117. Some observers said this meant Japan was rearming and becoming a military power. *New Action Guidelines, supra* note 117. Japan's government insisted this was not the case. *U.S. Called On to Share Latest Defense Technology With Japan*, JAPAN TIMES, Nov. 23, 1978.

At that time, almost eighteen years had passed since the US-Japan Security Consultation Committee ("SCC") had first met to set out the 1978 Guidelines. The process for reworking the old Guidelines began in April 1996, at the summit between U.S. President Bill Clinton and Prime Minister Ryutaro Hashimoto. *Tokyo, Washington Issue New Guidelines On Defense*, JAPAN TIMES, Sept. 24, 1997, at 1. The SCC, led by Secretary of State Madeline Albright for the U.S. and Foreign Minister Keizo Obuchi for Japan, released its Completion of the Review of the Guidelines for US-Japan Defense Cooperation in New York City on September 23, 1997. COMPLETION OF THE REVIEW, *supra* note 2. It outlined the supportive role Japan would provide the U.S. military in times of peace, during armed attacks on Japan, and in times of emergencies in "areas surrounding Japan." 1997 GUIDELINES, *supra* note 3.

In 1997, the issues facing the alliance were both strategic and logistic in nature.[119]

Aiming to meet both needs, the stated purpose of the 1997 Guidelines is to "provide a general framework and policy direction for the roles and missions of the two countries and ways of cooperation and coordination, both under normal circumstances and during contingencies."[120] This overarching goal is based on several major and continuing premises. Most importantly, existing security arrangements between the countries will be maintained.[121] Preserving these arrangements requires that the U.S. maintain its nuclear deterrent capability, and its forwardly deployed forces.[122] Another premise is that Japan will conduct any and all actions within the pre-established limits of Article 9, in accordance with its "exclusively defense-oriented" policy and three non-nuclear principals.[123] Although neither government is obligated to take any particular legislative, administrative, or budgetary actions, each is expected to take whatever steps are necessary to honor their respective commitments.[124] And finally, the 1997 Guidelines articulate each party's response to the four scenarios described below.

1. Cooperation in Situations in and Around Japan

In response to an armed attack against Japan, Section V of the Guidelines provides for bilateral actions to repel advancing forces, with the primary responsibility lying with Japan and reinforcement by the U.S. "as appropriate."[125] Regardless of whether air, sea, or ground operations are conducted, the U.S. is limited to a supplemental role.[126] Activities and

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[119] Strategically, it was the continuing instability on the Korean Peninsula and in the Taiwan Straits that illustrated the need to revisit the Defense Guidelines in 1997. These issues are discussed later in Section B of this Comment.

Logistically, it was unclear if wounded American soldiers could be treated at Japanese hospitals or if U.S. forces could use Japanese air or seaports in a conflict. Manning, *supra* note 7. In the event American lives are lost defending South Korea or in a violent outcome of Taiwan's reunification with China, and Japan does nothing to help, the U.S. would consider such inaction to be material breach of the treaty—regardless of Japan's explicit legal obligations. James Shinn, *Testing the United States-Japan Security Alliance*, 96 CURRENT HIST.–ASIA 425 (1997). The expected negative public reaction the U.S. and other major western allies will have to Japan declining to aid the U.S. is unacceptable to either government. *Id.*

[120] 1997 GUIDELINES, *supra* note 4, § I.

[121] *Id.* § II:1.

[122] 1997 GUIDELINES, *supra* note 5, § III.

[123] *Id.* § II:2.

[124] *Id.* § II:4.

[125] *Id.* §IV:1,2(a).

[126] *Id.* § IV:2 (c)(2).

requirements for operations include command and coordination, bilateral coordination mechanisms, electronic communication, shared intelligence, mutual logistical support, supply, transportation, maintenance, facilities, and medical services.[127] Cooperation in situations around Japan that affect its security is carefully defined as "not geographical," but "situational."[128] The two governments will make "every effort, including diplomatic measures, to prevent such situations from occurring."[129]

The heavy emphasis on coordination and mutual assistance creates ambiguity in this section of the Guidelines. It is unclear what role the parties have in some circumstances.[130] If both governments are aware of and participating in an event with potential for combat, based on Section V, it is conceivable Japan would be expected to use force in a manner inconsistent with Article 9.

2. *Search & Rescue and Evacuation*

Section V calls for U.S.-Japan cooperation in search and rescue missions within Japanese territory and in the seas surrounding Japan, noncombatant evacuation, and activities "ensuring effectiveness of economic sanctions" for maintenance of international peace and stability.[131] This language raises questions about who would provide support tantamount to enforcement and assertive self-defense (i.e., a preemptive strike) in an incident where both treaty partners were required to use force. For example, rescuing parties under attack where Japan attempts to intervene and rescue might cause the aggressor to identify Japanese forces as party to the conflict and attack the SDF. The same issue is raised for the scenario of retrieving noncombatants from a third-party country with similar circumstances where SDF personnel could draw the fire of one of the combatants even though the SDF was not party to the conflict. Although the Guidelines assume Japan will act in accordance with its constitution, they do not proscribe actions at the upper limits of assertive self-defense under "bilateral military" circumstances.[132]

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[127] *Id.* § IV:3.
[128] *Id.* § V.
[129] *Id.*
[130] *Tokyo, Washington Issue New Guidelines On Defense, supra* note 121; Tetsushi Kajimoto, *SDF Faces Tough Battle In Meeting New Demands,* JAPAN TIMES, Sept., 24, 1997, at 1, 4.
[131] 1997 GUIDELINES, *supra* note 4, § V:3(d).
[132] *Id.*

3. *Battlefield Rear Area Support*

Section V of the Guidelines creates the greatest Article 9 issues. Vague references to the "rear area support" Japan would provide U.S. forces during combat raise questions that traditionally make Japanese leaders nervous about international commitments and the Japanese people angry they might be violating their pacifist morals:[133]

> The primary aim of this rear area support is to enable U.S. Forces to use facilities and conduct operations in an effective manner. By its very nature, Japan's rear area support will be provided primarily in Japanese territory. It may also be provided *on the high seas and [in] international airspace around Japan* which are distinguished from areas where combat operations are being conducted.[134]

Despite the textual distinction between support and combat areas, assisting U.S. forces on "the high seas and [in] international airspace" necessarily raises the possibility of the SDF encountering North Korean or Chinese forces engaged in acts of war.[135] A plausible scenario of this kind is one in which the U.S. would direct the SDF to enforce a blockade around Japan to prevent spillover conflict from nearby hostilities while the U.S. conducted more direct engagements elsewhere.[136] A blockade of this kind presents a combined legal-political problem for Japan because of the small a difference between preemptive self-defense and aggression.[137] The more Japan's blockade duty is seen as helping the U.S. and less directly that of defending Japan, the more likely the SDF will appear as an aggressor.[138] Because the difference between preemptive self-defense and aggression may seem only conceptual, the mere advocacy of the right to use force in assertive self-defense is most likely objectionable to the Japanese public.[139]

The legal issues Section V raises are tied to the close confines of Northeast Asian geography. Japan would almost inevitably have to play a role if there was war on the Korean peninsula, regardless of whether the U.N.

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[133] Kajimoto, *supra* note 130.
[134] 1997 GUIDELINES, *supra* note 4, § V:4(b) (emphasis added).
[135] Kajimoto, *supra* note 130.
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] Robinson, *supra* note 112.

or the U.S. is conducting the defensive operations.[140] Korea is simply too close for Japan to remain unaffected.[141] The Taiwan Straits are more remote geographically, but Japan is the balancing Asian power to China and could not remain uninvolved with hostilities so close at least to the extent it wants to keep its alliance with the U.S. intact politically.[142] Deciding in advance where U.S. forces and the SDF will be and what role they each will have is prudent for deterrence and is an effective way to minimize loss of life in these contingencies.

Thus, where Japan deploys the SDF in Northeast Asia outside the immediate Japan archipelago and uses defensive force to support or compliment U.S. forces conducting operations affecting the defense of Japan, the force will be compatible with Article 9. In any event, Section V of the 1997 Guidelines creates authority in bilateral agreements between the U.S. and Japan by permitting Japan to, and creating expectations it will, use force in a still limited but growing set of circumstances.

4. Implementation

The Guidelines are not legally self-implementing.[143] The Japanese Diet is now grappling with the politically arduous task of passing the necessary legislation allowing implementation of the Guidelines with predictions of enactment in late 1998.[144] Public opposition to any increased role for the SDF is strong.[145] Consequently, the Diet lacks the political will to confront security issues directly.[146] "Hashimoto's government is a perfect example of risk-adverse consensus coalitions," notes one observer.[147] "[T]he Prime Minister would rather expose the alliance to a window of vulnerability than face splitting his fragile governing coalition with a decision on the question of collective self-defense."[148] Hashimoto's sagging public approval ratings and multiple political attacks from opponents make observers doubt his ability to

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[140] Shinn, supra note 119, at 430.

[141] *Id.* at 430.

[142] *Id.*

[143] 1997 GUIDELINES, *supra* note 4, § II:4; *New Defense Guide Defines More Mature Japan-U.S. Ties*, DEFENSE NEWS, Sept. 29, 1997, at 19.

[144] *Tetsushi Kajimoto, Cabinet Approves Bills Expanding SDF Overseas Role*, JAPAN TIMES WEEKLY INT'L, May 4, 1988, at 3. The Diet is currently considering the issue.

[145] Interview with Japan SDF Agency official (Dec. 5, 1997) (on file with author); Shinn, *supra* note 119, at 427.

[146] *Id.* at 425-26.

[147] *Id.* at 428.

[148] *Id.*

pass something so controversial.[149] With reports the Social Democrats will leave the coalition government,[150] it appears that incremental steps may be the best Japan is able to take at this time.[151]

As has occurred repeatedly in the past, however, Japan's leaders will rely on U.S. pressure to accomplish a difficult, domestic objective.[152] Japan does not always act in its own self-interest when it comes to security matters, as Japan's exploitation of the U.S. security guarantee and reluctance to deal with defense issues demonstrates.[153] Defense as an issue paralyzes Japan. Even after it agrees in private with the U.S. on a course of action, it must rely on the U.S. to convince it of the legitimacy of its own action and then to muster the political will to carry out the task.[154] Judging from the political, legal, and social factors in the interpretation of Article 9, where the 1997 Defense Guidelines present a solution to the current threats Japan faces from the Korean peninsula and China, Japan will declare them constitutional and pass necessary implementing legislation.[155] Given that the U.S. has been pushing Japan since the 1970s to assume more of the burden for its own defense, and taking into account the fear of these threats, Japan will almost assuredly adopt the 1997 Guidelines.

B. The Guidelines and U.S. Foreign Policy

The implementation of the Guidelines by Japan is a critical step in U.S. long-term foreign policy for Northeast Asia.[156] By clarifying the wartime roles of the U.S. and Japan, the Guidelines promote what should be the central United States goal of impelling Japan to act more like a leader by shifting more of the region's security burden to Japan.[157] This section examines the recent developments in Northeast Asia that required development of the Guidelines and then makes recommendations for U.S. policy for the region.

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[149] *Tokyo Considers Legislation to Support New U.S.-Japan Defense Guidelines*, JEI REPORT NO. 10 (Mar. 13, 1998).

[150] *Japan's Social Democratic Party to Leave Ruling Coalition*, AFX NEWS, May 1, 1998.

[151] Shinn, *supra* note 119, at 430.

[152] PYLE, *supra* note 16, at 75-76, 111-12.

[153] *See* discussion beginning at note 87.

[154] *See supra* note 152 and accompanying text.

[155] *See supra* discussion beginning in section II C of this Comment, in the text beginning after note 115.

[156] Cohen, *supra* note 6.

[157] *See supra* notes 33-36, 41-48 and accompanying text.

1. The Need to Revise the Alliance

U.S. foreign policy toward Japan for much of the post-cold war period has been to encourage Japan to take a more active leadership role in Northeast Asia appropriate to its great economic power without upsetting the region.[158] The largest reason why this goal has yet to be realized is because of Japan's failure to acknowledge its role as an aggressor in WWII.[159] Japan will not apologize to Asia because, rather than seeing itself as an aggressor in WWII, it sees itself as a victim.[160] As a result, anytime Japan considers changing its passive military role to that of an active role, Japan's neighbors loudly object.[161]

As an expression of U.S. containment policy, the U.S.-Japan security alliance worked well during the cold war. However, the reasons for which the alliance was forged, containment of Soviet and Japanese aggression, no longer pose the same threat.[162] The alliance has yet to adjust to new circumstances.[163] For example, in the postwar period, U.S. allies have grown in economic power relative to itself.[164] China has begun to assert itself as a regional military power.[165] The Korean Peninsula now must contend with the nuclear factor.[166] North Korea's compliance with the agreement it made with the U.S. in 1994 may be unraveling because the U.S. has been slow to produce the promised aid.[167]

Perhaps the most glaring evidence of the alliance's failure to adjust is the Persian Gulf War, where Japan, the world's second-largest economic and military power, did not send troops to aid allies against Iraq.[168] The Taiwan Straits crisis of a year ago[169] and the continuing tension on the Korean peninsula[170] reinforce Japan's need for protection and for overall stability.

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[158] PYLE, *supra* note 16, at 28, 34-36; Auer, *supra* note 29, at 77-78.

[159] PYLE, *supra* note 16, at 17.

[160] *Id.*

[161] *See infra* note 210.

[162] Shinn, *supra* note 119, at 425.

[163] *Id.*

[164] Hellmann, *supra* note 14, at 238.

[165] Shinn, *supra* note 119, at 426; Audry Tan, *Japan and China Must Reconcile*, BUSINESS TIMES, Sept. 13, 1997, at 2.

[166] Shinn, *supra* note 119, at 426.

[167] Elisabeth Rosenthal, *North Korea Says it Will Unseal Reactor*, NEW YORK TIMES, May 13, 1998, at A10.

[168] *See* PYLE, *supra* note 16, at 128-29; *see also* Balls, *supra* note 88.

[169] *See More Agony Than Its Worth?*, STRAITS TIMES, June 10, 1997, at 28.

[170] Shinn, *supra* note 119, at 426.

Finally, the 1998 Asian financial crisis has introduced even more instability into the region.[171]

Japan's self-imposed limits on the use of force, other than in defense of the Japanese islands have permitted positive but qualified collaboration between its SDF and the U.S. military. Yet, Japan's apathy towards non-economic international concerns continues unabated to this day.[172] The contradiction between Japan's dependency on U.S.-created global financial institutions and security regimes on the one hand, and its failure to act more like a leader in meeting its obligations to maintain the international system on the other, is straining its credibility and is a driving reason to revise the alliance. The contradiction is an unusual one. As one scholar notes: "If, as some Japanese critics have charged, this is not really an alliance at all but rather a patron-client relationship, then it is a peculiar relationship, one in which the patron commits to the defense of the client and the client commits to little in return."[173]

2. *Northeast Asia*

The 1997 Guidelines were developed as a strategic response to recent developments in Northeast Asia. For example, the Taiwan Straits incident in March 1996[174] stemmed from the enduring question of Taiwan's reunification with mainland China.[175] Just before the 1996 elections in Taiwan, its president publicly suggested it might not reunify with China.[176] In response, China's leaders staged military exercises in the Taiwan Straits in a dramatic show of force.[177] The missile test firings and mock blockade of Taiwan generated great fear in neighboring Japan.[178] Moreover, the incident raised questions of whether the U.S. would have to defend Taiwan if China used

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[171] Stanley Roth, U.S. Assistant Secretary of State for East Asian & Pacific Affairs, Prepared Statement before the House International Relations Committee (May 7, 1998).

[172] Conversation with Yoshio Uchiyama, Senior Diplomatic Consul for Seattle, in Olympia, Wash. (Feb. 19, 1998).

[173] Shinn, *supra* note 119, at 425.

[174] JEI REPORT No. 11, *supra* note 144.

[175] HARRY HARDING, A FRAGILE RELATIONSHIP: THE UNITED STATES AND CHINA SINCE 1972, at 13 (1992).

[176] *See* Melvin Goo, *Military Provocations Discredited,* Nikkei Weekly, April 1, 1996, at 7.

[177] *Id.*

[178] *More Agony Than It's Worth?*, *supra* note 169. One of the missile target zones was just 60 km from the Japanese island of Yonaguni, on which about 1,700 Japanese live. Hijiri Inose, *China Missiles Wake-Up Call to Japan?*, NIKKEI WEEKLY, Mar. 18, 1996.

force to reclaim Taiwan and whether Japan would be expected to help the U.S. in some way.[179]

China was only a minor threat to Japan when the Soviet Red Army was deployed at the Sino-Soviet border.[180] Now that China has emerged in the last decade from its self-imposed isolation, however, it does so with the reminder it was a competitor with Japan before the cold war.[181] A modern and technologically-developed economy is now China's primary goal and a major, multi-generational undertaking.[182] And although China is revitalizing its national defense forces, military domination of East Asia is not its aim.[183] Since the return of Hong Kong, Taiwan and the Sprately Islands are its only territorial ambitions.[184] China's final ambition is international acceptance as an equal to the world's great leaders.[185]

The U.S.-Japan, U.S.-China and China-Japan relationships compose a geopolitical triangle in a region lacking mediating institutions such as an Asian NATO, European Union, or any formal regional security structures.[186] The network of bilateral security ties the U.S. has individually with Japan, South Korea, Southeast Asian nations, and Australia is the uncoordinated and only regional security in east Asia.[187] There are signs of potential, regional security cooperation outside this traditional framework, such as the Association of South East Asia Nations ("ASEAN") Regional Forum, but they are tentative and undeveloped as of yet.[188] It is important for these relationships to be successful due to the fact the U.S., Japan, and China compose nearly half of the world's gross product and support three of the world's largest militaries.[189]

Korea is the powder keg.[190] In 1994, tensions increased on the Korean Peninsula when North Korea threatened to build a nuclear power plant

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[179] Shinn, *supra* note 119, at 430.

[180] Shinn, *supra* note 140, at 426.

[181] *Id.*

[182] Speech by Lee Kuan Yew, Senior Minister of Singapore, *in Why the China-U.S.-Japan Balance of Power Is So Vital,* STRAITS TIMES, Sept. 13, 1997, at 54.

[183] Interview with David Bachman, Professor of Chinese History, Jackson School of International Studies, University of Washington (Apr. 10, 1997).

[184] *Id.* China and Japan have not resolved their territorial dispute over this small archipelago.

[185] *Id.*

[186] Manning, *supra* note 7.

[187] *Id.*

[188] Satoshi Morimoto, *The Security Environment in East Asia, in* TOWARD A TRUE ALLIANCE, *supra* note 1, at 83, 90.

[189] *Id.*

[190] *Defense Guidelines, Okinawa and Others Challenge U.S.-Japan Defense Relations,* JEI REPORT NO. 5 (Oct. 31, 1997).

capable of generating weapons grade plutonium.[191] North Korea claimed it needed low cost power generation for its starving masses, but the U.S. strongly suspected it was going to use the plant's deadly by-product for a nuclear weapons program.[192] The U.S. was alarmed that Japan did not respond—waiting instead for the U.S. to resolve the situation.[193]

A possible clash with North Korean forces is the most likely reason the U.S. would call on Japan for help. An invasion by the North into the South would be particularly bloody.[194] It is also possible that Pyongyang harbors medium-range nuclear missiles capable of reaching Japan and the will necessary to launch them.[195] The fact Japan has little interest in accommodating these scenarios or any other contingency in Asia is the basic disagreement over the purpose of the alliance and a central, if unspoken, reason why the U.S. sought to revise the Guidelines.[196]

3. *The Japanese Archipelago*

American troops stationed in the Japanese archipelago and South Korea have had a variety of missions since their deployment at the end of WWII.[197] The most obvious mission has been to maintain a strategic alliance primarily against the now-defunct USSR and China north of the Korean peninsula.[198] Less acknowledged in the modern era is the reason they were deployed in the first place—to prevent Japan from rearming.[199] Currently, American troops provide deterrence from a possible invasion of South Korea from the North as well as additional assurance of protection of the sea lanes around Japan. Japan compliments the U.S. presence with its own defensive military capability.[200]

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[191] Ju-Yeon Kim, *Crisis Deepens as Inter-Korea Talks Collapse*, ASSOCIATED PRESS, Mar. 19, 1994.

[192] *Id.*

[193] JEI REPORT no. 5, *supra* note 190.

[194] Interview with Maj. Kurt Taylor, U.S. Army Intelligence Officer (Jan. 24, 1998).

[195] Michael O'Hanlon, *Theater Missile Defense and the U.S.-Japan Alliance*, *in* TOWARD A TRUE ALLIANCE, *supra* note 1, at 179, 180, 184-85.

[196] Shinn, *supra* note 119, at 427.

[197] The original reason for U.S. troops' presence was to reassure Japan's neighbors that they were safe from further invasions by Japan. PYLE, *supra* note 16, at 24. Deterring the former Soviet Union and North Korea has been the major missions of the U.S. military in Northeast Asia over the past 50 years. Mochizuki, *New Bargain*, *supra* note 1, at 10.

[198] *Id.*

[199] *Id.*

[200] Japan itself spends $50 billion a year on defense. Manning, *supra* note 7. It has more than 300 fighter aircraft, twice as many destroyers than the U.S. Seventh Fleet, sophisticated P3C antisubmarine aircraft, 200 F-15's, the most modern aircraft currently flying in U.S. forces, a large number of improved Patriot air-defense missiles, and the highly sophisticated and deadly Aegis sea-based air-defense system. Auer, *supra* note 29, at 83. Japan has acquired long-range airborne early-warning and air conflict management aircraft ("AWACS"), tanker

Despite the SDF's modern capabilities, however, Japan's ability to weather crises remains suspect.[201] As examples, the 1994 Korea nuclear crisis,[202] the 1995 Hanshin earthquake,[203] and the 1996 Peru hostage crisis[204] raise doubts about whether Japan can provide the kind of response the U.S. expects from an equal.[205] The 1997 Defense Guidelines lay a brick in the foundation of a credible and reliable defense. But they are not the structure itself.

As a society, Japan's reliance on the U.S. security guarantee exacerbates domestic problems. Stemming the social malaise caused by the moral failure of high-level bureaucrats[206] will probably require the Japanese equivalent of a Watergate/Vietnam-type domestic crisis. If Japan was to give its defense policy the of attention as it has given economic growth, many contradictions in Japan today would be corrected. Additionally, opening its markets to less fortunate and underdeveloped Asian neighbors instead of relying on the U.S. for a solution is a must. If Japan attempts to export itself out of the current Asian financial crisis, however, it could greatly prolong the recovery period of Asia as a whole.

Whether or not the Guidelines are implemented, Japan should use its current domestic constitutional debate over their adoption as a basis for reinterpreting Article 9 to permit collective security. The right to collective security is recognized in both the U.N. Charter[207] and the bilateral security treaty.[208] Committing to a collective security regime would allow Japan to act in concert with other nations in furtherance of international peace and not just in its

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aircraft, and long-range/road area Over-the-Horizon Radar. *Id.* As a result, even though Japan will keep its defense spending very close to one percent of its Gross National Product, it will possess (at least the equipment for) very advanced air and sea defense which would make it very difficult for aircraft or ships to move through the Sea of Japan undetected by the SDF. *Id.*

[201] Mochizuki, *Strategic Debates, supra* note 1, at 57.

[202] Kim, *supra* note 191; Manning, *supra* note 7.

[203] *Defense Guidelines, Okinawa and Others Challenge U.S.-Japan Defense Relations, supra* note 190. In January 1995, the Kobe metropolitan region of Japan suffered a terrible earthquake. Many perished. Worse, relief efforts were hampered because the pacifist Socialist Prime Minister was ideologically opposed to using the SDF for any reason whatsoever. Many deaths could have been prevented had the government taken better initiative. *Id.*

[204] *Id.* In a manner similar to the above events, the Japanese government was slow to respond to the late 1996 crisis in Lima, Peru where many Japanese were caught inside the Japanese embassy when terrorists took over the compound. *Id.*

[205] Shinn, *supra* note 119, at 425.

[206] *See Only 90 Government Corruption Cases in 1996, supra* note 115; *Osaka Reveals Abuse of 1.33 Billion Yen In Taxpayer's Fund, supra* note 115; *Tokyo Avoids Disclosure of Dining Expenses, supra* note 115.

[207] U.N. CHARTER, art. 1, para 1.

[208] KENPO, *supra* note 10; Mike Mochizuki, et. al, *Policy Recommendations, in* TOWARD A TRUE ALLIANCE, *supra* note 1, at 193, 196-97.

own defense.[209] Collective security would also allow Japan to set its own goals rather than passively letting the U.S. provide the initiative.

4. *Recommendations for U.S. Policy*

The U.S-Japan security alliance should continue to provide strong deterrence, reassurance, and crisis response. To these ends, the 1997 Guidelines represent a measured and successful way to kill two birds, the threats posed by China and North Korea, with one stone. The public announcement of the Guidelines serve as a delicate reminder to both China and North Korea that the U.S.-Japan security alliance will be invoked if conditions so require. China and South Korea's urgent response to the announcement of 1997 Guidelines was surprising considering that the Guidelines represent only a minor development in the role of the SDF.[210] To alleviate regional instability, when the Guidelines are found constitutional, the U.S. should implement the following recommendations.

First, the U.S. must take advantage of the urgency caused in China and on the Korean peninsula by the announcement of the Guidelines to revitalize cooperation between South Korea and Japan. A NATO-like organization should be created between the U.S., South Korea, and Japan. The urgency from the Guidelines' announcement should also be used to continue to integrate China into the international system by making it more dependent on its workings and more rewarding if it does. China's long-term interests, such as modernization through membership in international organizations,[211] should be linked to security cooperation in Northeast Asia.

Second, the U.S. must begin to see Japan as a true equal if it expects Japan to give up its dependency on the American security guarantee and begin acting like an international leader. As mentioned above, this requires encouraging Japan to continue to reinterpret its constitution to permit collective security.[212] The viability of this policy depends on the nature of short and long-term threats. The reunification of Korea is a relatively short-term threat that will come to a head through either a military conflict or a peaceful resolution in the next decade or two. Resuscitation of the

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[209] *Id.*

[210] *See* China *Warns Japan Against Widening Defense Cooperation*, THE JAPAN TIMES, Sept., 26, 1997; *and South Korea Slams Japan-U.S. Defense Cooperation Guidelines*, XINHUA NEWS AGENCY, Sept. 25, 1997, *supra* note 115.

[211] The World Trade Organization or G-8, for example. Mochizuki, et. al., *Policy Recommendations, supra* note 1, at 200-01.

[212] Mochizuki, *Strategic Debates, supra* note 68, at 57-58.

beleaguered Asian economies obviously must also be short-term. The accommodation and integration of China into the international realm, however, is a much more long-term goal. Together, Japan and the U.S. can steady the Korean conflict and promote peaceful and productive Chinese reunification. Also together, the U.S. and Japan can provide open markets to revitalize the short-term economic self-destruction of South Korea, Indonesia, and Cambodia.

Lastly, and most importantly, and in order for the other two goals to have a chance for success, the U.S. must support Japan in making a meaningful apology for WWII.[213] This single issue more than any other can eliminate Japan's security problems.[214] Significantly, and in contrast to Japan, Germany has confronted its past in earnest.[215] But because of this omission, Japan lives in dread of its neighbors' disgust and misunderstanding.[216]

Genuine reconciliation with her neighbors would ameliorate the need for U.S. troops in Japan. The U.S. must eventually remove these troops from Asia. This move will free up crucial territory in South Korea for residential and commercial activities and lessen the burdens on Okinawa.[217] The removal of the troops would raise Japan's costs for defense in the near-term, but would lower them dramatically in the long run. If Japan's neighbors are not threatened by Japan, they likely would not object to Japan leading U.N. peacekeeping and enforcement operations.

In the unlikely event that Japan finds the Guidelines unconstitutional, it will embarrass its ally, the U.S., and weaken the alliance by showing it cannot deliver what it commits to publicly. In this case, the U.S. will have to rebuild relations with Japan to learn what it is willing to do to in order to deter hostilities near its islands. Should events follow this course, the U.S. should shift its policy emphasis to encourage Japan to amend Article 9 to permit collective security.[218] Such an amendment would allow Japan to provide for its own security without self-defense limitations. An acknowledgment of its

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[213] PYLE, *supra* note 16 at 16-17

[214] *Id.* at 17

[215] *Id.*

[216] *More Consultation Needed on Security*, DAILY YOMIYURI, Sept. 26, 1997.

[217] The presence of the U.S. troops in Okinawa creates great strain on the local population. Noise from over-flying jets, artillery practice, and weapons maneuvers as well as pollution, crime and loss of valuable farming land are greatly resented. *See* Chalmers Johnson, *The Okinawan Rape Incident and the End of the Cold War in East Asia*, 27 CAL. W. INT'L L.J. 389, 395-96 (1997).

[218] Amendment to the Japanese Constitution requires two-thirds majority vote in the lower House of Japan's Diet and subsequent ratification by the people through special referendum. KENPO [CONSTITUTION], art. 96. Finally, the Emperor shall promulgate the amendment. *Id.*

wrongdoing in WWII in this case is all the more necessary on Japan's part because of the great apprehension Japan's neighbors have of any change in its military role in Asia.

In sum, the U.S. security guarantee prevents Japan from acting like a self-sufficient country. The U.S. should reorient its policy to withdraw from the role of Japan's protector wherever possible. The U.S. should also treat Japan, a counterpart that has made amazing accomplishments in the last century, as an equal. Only then can the United States consider what it would be like to work on more equal footing with Japan. The new ally would not always agree, but the U.S. would not have to push its weight around every time there was an international crisis. In its part of the world, the strong new ally would already be engaged in a solution that the U.S. could support.

V. CONCLUSION

The 1997 U.S.-Japan Defense Guidelines represent a minor escalation in Japan's military role in the U.S.-Japan security alliance, a minor legal enhancement to the Security Treaty, and a major symbolic move to Japan's electorate and neighboring Asian countries. Japan's likely determination that the Guidelines are constitutional will help Japan place one foot in front of the other on the slow path to self-sufficiency and stability in Northeast Asia. Such difficulty in assuming international responsibilities appropriate to its power and importance reflects the suspension of natural forces in Japan created by the United State's security guarantee.

Japan, seemingly boxed into a situation with no escape, must choose the option under its nose—apology for its past. Only then will differences like those between the 1978 and 1997 Guidelines receive the small attention they deserve. The stage will be set for Article 9 to be amended and Japan will develop a more typical security policy. In this context, Korea will eventually reunify. China will assert itself and become a participant in the community of nations. And finally, barring glaring errors in judgment on the part of the U.S. or Japanese governments, the U.S.-Japan Security Alliance, with its newest addition, the 1997 Defense Guidelines, will be the tool used to smooth the bumps in the coming decades.