

(Translation)

Report of the Advisory Panel on Reconstruction of the
Legal Basis for Security

June 24, 2008

The Advisory Panel on
Reconstruction of the Legal Basis for Security

CONTENTS

FOREWORD	1
Part I. Japan’s Security Environment and the Need for Reconstructing the Legal Basis for Security	
1. Japan’s Security Environment and the Legal Basis for Security.....	3
2. The Security Environment in the 21 st Century.....	5
3. The Government’s Constitutional Interpretation of Security Issues.....	6
4. Factors That Urge Changes in Constitutional Interpretation.....	7
Part II. The Panel’s Opinions on Each of the Four Cases	
1. Defense of U.S. Naval Vessels on the High Seas.....	9
2. Interception of a Ballistic Missile That Might Be on Its Way to the United States.....	10
3. Use of Weapons in International Peace Operations.....	12
4. Logistics Support for the Operations of Other Countries Participating in the Same U.N. PKO and Other Activities.....	14
Part III. The Panel’s Basic Understanding of Article 9 of the Constitution	
1. Opinions on the Four Cases and their Premise.....	17
2. Interpretation of Article 9 of the Constitution.....	17
3. Exercise of the Right of Collective Self-Defense and Participation in Collective Security Led by the United Nations.....	19
4. Requirements for the Exercise of the Right of Self-Defense.....	20
5. Possession and Exercise of the Right of Collective Self-Defense, and the Concept of International Conflicts.....	20
6. Summary of Part III.....	21

Part IV. Recommendations on Security Issues Pertaining to the Four Cases and Related Matters

1. Recommendations on the Four Cases..... 23

2. Restrictions to be Imposed on the New Security Policies (so-called “hadome”)..... 25

3. How to Formulate New Security Policies.....26

4. Conclusion.....27

SUMMARY.....28

References:

“Advisory Panel for Reconstruction of the Legal Basis for Security”
(April 17, 2007 Prime Minister’s Decision).....34

Members of “Advisory Panel for Reconstruction of the Legal Basis for Security”
(As of June 24, 2008)..... 35

Meetings of “Advisory Panel for Reconstruction of the Legal Basis for Security” 37

Opening remarks by the then Prime Minister Abe at the First meeting of the “Advisory Panel
on Reconstruction of the Legal Basis for National Security” on May 18, 2007 38

FOREWORD

After the end of World War II, Japan put its entire effort into post-war reconstruction and economic growth and made conscientious efforts not to disturb the international peace. The principle of promoting peace, defined as not undertaking aggression against other countries or pursuing militarism, has taken deep root, especially during the post-war period, and must continue to be upheld. However, it is apparent that the security of a country and world peace cannot be achieved just by aspiring to these goals. Japan has achieved long-lasting peace thanks to a peaceful international environment built upon diplomacy and the effective deterrence of Japan's own defense efforts supplemented by the Japan-U.S. alliance.

Active debates on Japan's security policy took place inside and outside the arena of the Japanese Diet for a long while after the end of World War II. Most of the disputes between the conservatives and reformists were ideological arguments over whether the Self Defense Forces could be deemed constitutional or unconstitutional and whether the two sides were for or against the Japan-U.S. Security Treaty. The specific issues regarding the actual operation of the Japan-U.S. Security Treaty and related matters also usually arose against this backdrop of ideology. Under those circumstances, not much debate was heard about the fundamentals of security, when faced with challenging international relations, or how Japan could protect the lives, assets, land and such basic values of Japanese citizens as human rights and democratic principles.

The Gulf Crisis in 1990 and 1991 brought about some changes in this situation. When Japan's response to the Gulf Crisis and later its participation in the U.N. PKOs were called into question, various discussions were held inside and outside the Diet on the interpretation of Article 9 of the Constitution; these discussions went beyond the scope of the right of self-defense and included the perspectives of collective security for the first time since World War II. Following these debates, Japan belatedly began participating in U.N. PKOs and other international peace operations in recognition of the need to become more active in cooperative efforts for international peace, rather than simply not disturbing it. However, since the interpretation of Article 9 of the Constitution remains basically unchanged, Japan's activities are still restricted in many ways.

The advent of the end of the Cold War brought about further drastic changes in the world security environment. New threats, namely the increasing gravity of terrorism and proliferation of weapons of mass destruction, were added to the top of the list of classic threats to security, namely aggression by foreign states. In particular, the development of nuclear weapons and missiles by neighboring North Korea emerged as a direct and new threat to Japan. Japan is now urged to respond immediately to manifold threats.

This report details the dramatic changes in the security environment surrounding Japan that occurred in the period immediately after World War II, when Japan's Constitution was enacted, during the Cold War era, in the period that followed the end of the Cold War, and during the period from then until today. Faced with such a drastically changing security environment, Japan is now pushed to return to the very basics of security and must deliberate seriously about how to protect the irreplaceable lives, assets, land and other such basic values of Japanese citizens as human rights and democratic principles. At the same time, Japan should attach utmost importance to its cooperation for international peace, in light of its enhanced position in the international community. As for interpretation of Article 9, it is also important not to swerve from the original purpose of security, or fall into the

impediments of adhering to precedent, or halting the thinking process. Rather, it is essential to review open-mindedly the stipulations of the Constitution. Furthermore, Japan needs to face up to the stark international security environment and decide on an optimum security policy to ensure world peace and Japan's security. I earnestly hope that this report will contribute to the reconstruction of the legal basis for that security.

Shunji Yanai, Chairman
Advisory Panel on Reconstruction of the Legal Basis for Security

Part I. Japan's Security Environment and the Need for Reconstructing the Legal Basis for Security

1. Japan's Security Environment and the Legal Basis for Security

Security environment is constantly in flux. Japan's security environment in the 21st century is different from that in the 20th century, and the security environment in Asia immediately after the end of World War II was different from that during the Cold War, which was also substantially different from that in the post-Cold War era. Furthermore, the security environment today is quite different from that during the period immediately after the end of the Cold War. In addition to these changes arising from international circumstances, Japan's own situation has also changed significantly, and Japan's enhanced position in the international community has resulted in greater responsibilities as well. Today Japan must formulate national security policies that are appropriate responses to these changes.

National security policies for any state where the rule of law is to prevail must be implemented in accordance with clearly defined laws. In Japan, the Constitution being the basis for all domestic legislation, various laws are formulated based on appropriate interpretation of the Constitution. Therefore, the government needs to implement its national security policies in accordance with that legal basis. This legal basis, however, must constantly be reexamined in response to changes in the national security environment. Japan's present legal basis, the backbone of which is the Constitution, was formulated in response to the national security environment and political situation at a particular time in the course of the nation's history. It is therefore necessary to examine whether the present legal basis is optimal or not in light of the present national security environment.

Were the security environment relatively unchanged, it might not be necessary to make changes in the legal basis, which consists of current constitutional interpretations and existing laws. Japan's security environment in the 21st century, however, is substantially different from that in the middle of the 20th century, when the Constitution was enacted; in addition, the environment has subsequently undergone significant changes from that during the Cold War era, when on various occasions the government presented its constitutional interpretations concerning such issues as the right of collective self-defense. Furthermore, the national security environment in the 21st century is different from that immediately after the end of the Cold War. For this reason, the legal basis, including constitutional interpretation, must be reexamined in view of these changes in the security environment.

Clearly laws should not be interpreted merely in such a way as to match reality expediently. Nevertheless, it should be noted that the interpretations maintained so far are not the only legally possible and rational interpretations. Furthermore, it is possible that current interpretations that have developed historically may be excessively complex or may include inappropriate concepts that are inconsistent with international law, if observed in the context of an overall legal system. The legal basis needs to be reviewed from the perspective of consistency and reasonableness of the legal interpretation, in addition to its compatibility with the actual national security environment.

Former Prime Minister Abe, in consideration of the changes in the security environment and of the appropriateness of the legal interpretations, presented the following four cases as issues to be examined by the Advisory Panel.

(1) Suppose Japanese Maritime Self Defense Force (JMSDF) vessels are engaged in operations, such as joint training, in the vicinity of U.S. naval vessels on the high seas. In the event of an armed attack against U.S. naval vessels during such operations, can the JMSDF vessels be put in a position where they are unable to aid the U.S. vessels?

(2) There is no doubt that if the United States, an ally of Japan, suffers substantial damage from a ballistic missile attack, this will seriously affect Japan's own defense. Setting aside the question of technological capabilities, can Japan be put in a position where it is unable to intercept ballistic missile that might be enroute to the United States, even when the missiles are detected by radar systems of the Self Defense Force (SDF)?

(3) Regarding the use of weapons in international peace operations, if units or personnel of other countries are engaged in the same PKO or similar activities and are attacked, other units or personnel can, of course, come to the site for their assistance using weapons if needed. Can Japanese personnel be put in a position where they are prevented from such actions?

(4) Regarding "logistics support" for other countries participating in the same PKO or similar activities, even though activities such as supply, transportation and medical services are not in themselves "use of force", the current constitutional interpretation does not allow such support if it is provided in a manner that forms an "integrated part" of the use of force by other countries. (This interpretation is known as the concept of "ittaika* with the use of force"). Is it appropriate to continue to apply this concept to logistics support activities?

* According to the hitherto held constitutional interpretation, even though Japanese logistic support, including supply, transportation and medical services, is not in itself "use of force", such support should be deemed as "use of force" prohibited under the Constitution if it is provided in such a manner that forms an "integral part" of the use of force by a third country. This concept is called "ittaika" with the use of force in the current interpretation of the Constitution.

The cases above seem to have been presented in recognition of the fact that Japan's security would be threatened if the government could not make appropriate responses in these cases. It is the Advisory Panel's understanding that it was tasked to examine ways to improve the legal basis for each of the above four cases, including possible changes in the views and interpretation of the government, as well as possible amendment of the relevant laws, bearing in mind the views that the government has hitherto held. Basically, cases (1) and (2) relate to the right of self-defense, while cases (3) and (4) relate to international peace operations. These two issues should be clearly distinguished for consideration.

The Advisory Panel's examination of these four cases will be described in detail in Part II of this report, followed by the Panel's basic understanding of Article 9 of the Constitution, resulting from this examination, in Part III. Subsequently in Part IV, the Panel will make its recommendations. The Panel will first explain in the remainder of Part I the features of the present security environment and outline the Government's current constitutional interpretation regarding national security, as a basis for the Panel's examination and recommendations.

2. The Security Environment in the 21st Century

In what aspects does the security environment of the 21st century differ from that in the past? First, there has been a diversification of security threats. The end of the Cold War has seen the reduced possibility of wars between major states, though admittedly that possibility has not been reduced to nil. There are also continuous threats posed by the national security policies of some countries. There are countries that possess weapons of mass destruction, including nuclear weapons and ballistic missiles, and maintain the posture that they will not rule out use of force against neighboring countries.

In addition, there are unsolved conflicts in various parts of the globe, due to such factors as nationalism, which could result in large-scale hostilities. Specifically, intra-state conflicts and quasi-intra-state conflict situations are prevalent in various regions of the world, resulting from failure to achieve national unity due to antagonism among ethnic groups and tribes. Furthermore, the 21st century is characterized by the emergence of the problem of terrorism as a form of large-scale violence. The terrorist attacks on September 11, 2001 are illustrative of this problem, and terrorist threats continue worldwide. International terrorist networks tend to base themselves in states that lack sufficient governance resulting from persistent intra-state conflicts. This vindicates the close linkage between threats of terrorism and the continuance of intra-state conflicts, making it impossible to rule out potential collaboration between such actors as terrorists and particular countries that could give rise to threats to the international community. The dangers of weapons of mass destruction and ballistic missiles falling into the hands of terrorists are also too serious to ignore.

There are various factors contributing to the diversification of threats, and we cannot neglect the role of technology. While technological progress might aggravate the threats caused by terrorists and dangerous countries, the same progress can also bring about measures to counter these threats. The threats caused by ballistic missiles on the one hand and ballistic missile defenses on the other clearly demonstrate the changes in the security environment caused by technological progress.

The second aspect of changes in the security environment is that the international community is increasingly making concerted efforts to respond to security issues. The decisions of the U.N. Security Council have been playing an increasingly important role in the process of settling various international conflicts, and international peace operations initiated by U.N. resolutions and other measures have become actively employed to stabilize intra-state conflicts in various parts of the world and in efforts to suppress terrorism. Countries are also beginning to conduct joint operations to prevent the proliferation of weapons of mass destruction and ballistic missiles. Meanwhile in the international community, deeper understanding of the concept of the right of collective self-defense and collective security has developed through relevant judgments and opinions handed down by the International Court of Justice.

In short, a feature of the present security environment is increasing emphasis on joint measures by the international community in the face of diversifying security threats. While the need for Japan to maintain the effectiveness of its own defense system for its own security has not diminished, it is, at the same time, necessary for Japan to make every effort to maintain and further enhance the effectiveness of the Japan-U.S. alliance and also

to cooperate with the international community in joint actions. Therefore, from these viewpoints, it is necessary to review the legal basis for Japan's security policies.

3. The Government's Constitutional Interpretation of Security Issues

The Constitution of Japan, in particular Article 9, is the linchpin of the legal basis for Japan's security policies. It is widely known that there have been various views and interpretations of Article 9 since the time of its enactment, and there have been a variety of political debates on the Article ever since. Some call for amendment of the Constitution to bring an end to these debates. The following are typical views expressed by the Japanese Government regarding Japan's security.

First, the Government understands that Japan has the right of self-defense and that the SDF does not constitute a breach of the Constitution. Regarding the existence of the right of self-defense, the Government has maintained that, "the Constitution does not deny the right of self-defense, because this is a right inherently possessed by any independent state and therefore it is obvious that Japan has the right of self-defense under the present Constitution." In line with this interpretation, then Defense Minister, Omura, answered in the Diet on December 22, 1954 that "it is not a violation of the Constitution for Japan to set up an armed force such as the SDF charged with self-defense duties and to possess military power to the extent that is necessary for that purpose."

Second, the Government recognizes that there are some restrictions on the exercise of the right of self-defense. For example, as explained in the government's written answer to a question asked in the Diet on September 27, 1985, "under Article 9 of the Constitution, Japan is permitted to use force as an exercise of the right of self-defense if the following three requirements are met: (1) there is an imminent and unlawful infringement against Japan; (2) there is no other appropriate means available to repel this infringement; and, (3) the use of force should be limited to the minimum and necessary level."

Third, with regard to the right of collective self-defense, as outlined in the Government's written answer dated May 29, 1981, and which closely followed the Government's view expressed on October 14, 1972, the Government position has been expressed as follows: "It is obvious that Japan as a sovereign state inherently possesses the right of collective self-defense under international law, but the exercise of the right of self-defense as allowed under Article 9 of the Constitution is limited to what is minimum and necessary to defend the country, and exercise of the right of collective self-defense exceeds that range and therefore is not permitted under the Constitution."

Fourth, even in international peace operations conducted under the United Nations and other international frameworks, acts that might lead to the use of force have been deemed to risk violating Article 9 of the Constitution. For example, Mr. Akiyama, then Director-General of the First Department of the Cabinet Legislation Bureau, answered in the Diet on May 14, 1998, that "out of the various activities related to collective security or PKOs, Japan is not allowed to conduct activities that entail the use or threat of force as prohibited under Article 9 of the Constitution."

Fifth, acts that are deemed to be "ittai" with the use of force by other countries, including activities conducted under the U.N. or by allied countries, are interpreted as constituting a breach of the Constitution even if the acts themselves are not the use of force.

4. Factors That Urge Changes in Constitutional Interpretation

As mentioned above, today's security environment for Japan is significantly different from that of the Cold War era and the period immediately after the end of the Cold War. While security threats are more diverse, in that the proliferation of weapons of mass destruction, ballistic missiles, and serious incidents of terrorism pose new type of threats, clearly, the threats caused by certain states still exist. At the same time, numerous international conflicts require joint efforts by the international community.

Japan's basic security strategies in the face of such realities should be as follows. First, Japan needs to maintain effective defense capabilities of its own to prevent direct threats from reaching it and to minimize damage in the event that a threat actually does reach its territory. Second, Japan needs to maintain and continuously enhance the Japan-U.S. alliance based on their Security Treaty, since no state in today's world can ensure its security alone, and this is especially true in the case of Japan. In this connection, we must be cognizant of the fact that the United States is Japan's only ally that undertakes its obligation to defend Japan under the Japan-U.S. Security Treaty, and is also ready to cooperate with Japan in order to contribute to the peace and security of the Far East. It is therefore essential to enhance the credibility of Japan-U.S. cooperation. Especially in recent years, Japanese and U.S. Aegis-equipped vessels have been conducting joint operations to track North Korean missiles, posing a potential problem if JMSDF and Japanese Air Self Defense Force (JASDF) are unable to protect U.S. naval vessels during such operations. Furthermore, if Japan cannot engage in the joint operations necessary to counter ballistic missiles, despite possessing Aegis-equipped vessels with missile interception capabilities, this could be detrimental to the maintenance and enhancement of the Japan-U.S. alliance. Third, Japan needs to contribute actively to the joint efforts of the international community to solve disputes in various parts of the world and maintain and restore international peace and security; this is not only Japan's duty as a responsible member of the community of nations, but also necessary to improve the security environment for ensuring Japan's own security.

In view of these factors, a question is posed: is the present legal basis for security appropriate and adequate for the implementation of Japan's basic security policies based on the aforementioned strategies under today's complex and unstable security environment? More specifically, is the Government's interpretation of Article 9 of the Constitution really appropriate and sufficiently convincing? According to the Government's interpretation, while Japan has the right to individual self-defense under Article 9 and can use force as an exercise of that right if the aforementioned three requirements are met, exercise of the right of collective self-defense exceeds what is minimum and necessary to defend the country and therefore is not permitted under Article 9. In other words, Japan possesses the right of collective self-defense as a sovereign state under international law but it is not permitted to exercise this right under the Constitution. Is this interpretation compatible with effective maintenance of the Japan-U.S. alliance under the present security environment? Furthermore, as regards international peace operations, such as U.N. PKOs, the Government has maintained that the use of weapons by SDF, even in such peace operations, might violate Article 9 of the Constitution if conducted in a way that could lead to the use of force. Moreover, the Government has maintained that even logistics support, which itself is not the use of force, constitutes a breach of Article 9 of the Constitution if such support is

provided in such a manner that forms an “integrated part” of the use of force by other countries. Can Japan effectively engage in international peace operations under a legal system that is based on such restricted interpretations of the Constitution?

The aforementioned four cases highlight the specific problems that Japan might face in future efforts to continue to maintain the effectiveness of the Japan-U.S. alliance and to be actively involved in international peace operations. As detailed in Part II through Part IV, this Panel has concluded that Japan’s potential inability to take appropriate action in these four cases could seriously affect the nation’s security and, therefore, Japan should update its constitutional interpretation in order to be able to handle these four situations appropriately.

The Panel has no intention of proposing a legally unsustainable change to the interpretation simply for the sake of expediency in dealing with these four cases. Rather, the Panel believes that the constitutional interpretation proposed herein is based on legally consistent logic and internationally accepted standards. In contrast, adherence to the present governmental interpretation could result in a series of legally unsustainable interpretations. The Panel therefore believes that the government should adopt an amended interpretation of the Constitution that is consistent with changes in Japan’s and the world’s security environment and is consistent with international law.

Part II. The Panel's Opinions on Each of the Four Cases

The Panel examined the four cases based on the basic understandings described in Part I of this report. In Part II the Panel will identify the specific and actual security issues that Japan is urged to deal with under the present security environment in relation to each of the four cases, and will describe the Panel's views on the policies that need to be implemented in order to deal with these issues effectively. This will be followed by the Panel's opinions on the following questions: Whether such policies can be implemented based on the present legal basis; what restrictions exist that hinder policy implementation under the current interpretation; and, what measures can be taken to address such restrictions with a view to ensuring Japan's security. More specifically, discussion will focus on the following points for each of the cases: (1) Actual situations in question; (2) Policy goals to be achieved; (3) Restrictions imposed by the present legal basis; and, (4) Options for overcoming these restrictions. Additional Panel opinions, other than on these four points, are expressed in (5) Related matters.

1. Defense of U.S. Naval Vessels on the High Seas

(1) Actual situations in question

The question is whether JMSDF vessels can be put in a position where they are unable to assist U.S. naval vessels in a case where the latter come under attack while engaged in joint operations on the high seas, such as joint training, in the vicinity to each other. A conceivable example would be refueling activities being conducted by U.S. and Japanese vessels moving side by side; however, it should be noted that, in actual operations, joint activities are usually conducted in vast areas of the high seas where vessels are separated from each other by several hundred kilometers and are rarely conducted in the close proximity required for refueling activities.

It is also necessary to consider the realities of missile attacks. First, in a case where a U.S. naval vessel is engaged in warning and surveillance activities related to missile attacks against Japan, namely activities that are closely related to Japan's security, and is focusing its radar on incoming missiles, the vessel's ability to defend itself is reduced, increasing the need for SDF vessels or aircraft operating near the U.S. naval vessel to defend it.

Second, although the Government has expressed the view that there are cases where JMSDF vessels can defend U.S. naval vessels by means of a "reflex effect"*¹, of the use of weapons by SDF personnel to protect themselves** and SDF weapons and other equipment, this would not provide a realistic and clear legal justification for defending the U.S. vessels where attacks on the JMSDF vessels have not yet been made and where U.S. naval and JMSDF vessels are conducting joint maritime activities and where a missile is launched from a distance.

* According to an answer given by the Government in the Diet, use of weapons by JMSDF personnel to protect themselves and SDF weapons and other equipment could result in defending a U.S. naval vessel as a "reflex effect" when and only when the JMSDF vessel is sailing alongside the U.S. vessel for activities such as oil refueling.

** Under current Japanese law, in cases other than those when the exercise of individual self-defense is authorized, SDF personnel are permitted to use weapons only to defend themselves, other SDF members at the site, and those “under their control” at the site.

(2) Policy goals to be achieved

In order to protect the life and property of the Japanese people in an increasingly severe security environment, it is all the more important to ensure that the Japan-U.S. alliance functions effectively, and to consider the issue of the defense of U.S. naval vessels from the viewpoint of mutual trust between two allies. It is therefore unquestionably necessary to defend U.S. naval vessels in an actual situation as described in (1) above for the sake of ensuring mutual trust between the two allies and for Japan’s own security.

(3) Restrictions imposed by the present legal basis

According to the current Government interpretation that Japan possesses the right of collective self-defense under international law but is prohibited from exercising this right under the Constitution, a JMSDF vessel cannot, in principle, defend a U.S. naval vessel in a situation as described in (1) above, for such an action would be deemed an exercise of the right of collective self-defense. The current constitutional interpretation and the provisions of current laws provide for situations where the defense of U.S. naval vessels is possible by means of the exercise of the right of individual self-defense when an armed attack occurs against Japan in an “organized and planned” manner, or where defense is possible by means of a “reflex effect” of SDF personnel protecting themselves and SDF weapons and other equipment, the latter being based on Article 95 of the SDF Law, when the SDF vessel is sailing alongside a U.S. vessel for activities such as refueling. This view is expressed in an answer given by the Government in the Diet. These cases, however, are rare as described in (1) above, and a JMSDF vessel cannot respond to a request for help from a U.S. naval vessel by means of the “reflex effect,” if the US vessel is engaged in a joint exercise in waters far from the SDF vessel.

(4) Options for addressing the restrictions

There are two potential options to bridge this gap between the policy goal described in (2) above and the restrictions described in (3). One is, in line with the framework of the current constitutional interpretation, to expand the application of the right of individual self-defense to enable a JMSDF vessel to defend a U.S. naval vessel that is under attack at a distance. The other is to change the constitutional interpretation that Japan is allowed to exercise only the right of individual self-defense and enable Japan to exercise the right of collective self-defense as well. Concerning the first option, it is difficult under international law to justify the defense of a U.S. naval vessel by expanding the application of the right of individual self-defense, while the policy goal would not be fully attained, either. On the other hand, regarding the second option, offering defense as part of the exercise of the right of collective self-defense can fully attain the policy goal of defending a U.S. naval vessel and will be consistent with international law, as Japan can exercise that right as a sovereign state.

2. Interception of a Ballistic Missile That Might Be on Its Way to the United States

(1) Actual situations in question

Recognizing that ballistic missiles, and in particular those carrying weapons of mass destruction, can cause tremendous damage to citizen as well as military targets, the use of these missiles must be stopped from a humanitarian perspective. However, decisions to take countermeasures against such missiles would have to be made within minutes or even seconds. If Japan were allowed to shoot down only those missiles directed at itself while multiple missiles were directed toward both Japan and the United States, obviously it would be difficult for Japan to make an appropriate decision regarding each of the multiple missiles in a critically short time. Therefore, the procedure to respond to missile attacks must be simple and clear, enabling prompt action.

(2) Policy goals to be achieved

As stated in Part I, if the United States, an ally of Japan, suffers substantial damage due to a ballistic missile attack, this will seriously affect Japan's own defense and will seriously jeopardize the basis of the Japan-U.S. alliance, which is the foundation of Japan's security.

Ballistic missile defense is a joint operation by Japan and the United States that requires much closer collaboration between the two countries, and Japan is heavily dependent on the United States for such matters as intelligence and nuclear deterrence. Therefore, it is not possible to consider only the missile defense of Japan without taking into account such cooperation.

Moreover, ballistic-missile deterrence will be weakened if Japan takes the position that it can shoot down ballistic missiles approaching Japan by exercising the right of individual self-defense but not the ones directed toward the United States because the latter would constitute an exercise of the right of collective self-defense; or, Japan cannot take prompt action because it is uncertain which of these the actual situation is.

It is not an option for Japan not to shoot down ballistic missiles that might be flying towards the United States when Japan has the ability to do so.

(3) Restrictions imposed by the present legal basis

So far as the Japanese Government maintains its current position that Japan possesses the right of collective self-defense under international law but is not allowed to exercise the right under the Constitution, it would be unable to shoot down missiles directed at the United States, an ally of Japan. Namely, the policy goal mentioned in (2) above could not be attained.

The Government's position is also that it will first respond to missiles directed at Japan by means of exercising its police power in accordance with Article 82-2 of the SDF Law, since it might not always be clear whether a launch of missiles directed at Japan constitutes an armed attack. Such a response to missiles would be justified as an emergency measure under international law. On the other hand, if the missile launch were recognized as an armed attack against Japan, the Government would deal with the situation by exercising its right of individual self-defense, after taking necessary procedures, starting with the Security Council of Japan, followed by Cabinet Decision, and then approval by the Diet. In this way, the Government is obliged to follow a deliberate two-track procedure. However, in reality it is doubtful that such a procedure would enable Japan to respond effectively to a missile directed toward the United States.

Furthermore, as regards the proposition, as shown in the aforementioned Government's view, that Japan can deal with missiles by exercising its police power, it must be pointed out that under international law a state cannot in principle exercise police power in outer space, over which a state cannot claim sovereignty.

(4) Options for addressing the restrictions

As mentioned in (2) above, so far as the policy goal of Japan necessitates the shooting down of missiles directed at the United States if Japan is capable of doing so, there seems to be no option other than to permit the exercise of the right of collective self-defense, which legally permits the shooting down of such missiles.

(5) Related matters

It is most important for the effective functioning of missile defense to establish and maintain, in times of peace, a system and procedures that enable the Government to make prompt decisions and implement them without delay.

3. Use of Weapons in International Peace Operations

(1) Actual situations in question

Activities of international peace operations are conducted at various levels. Taking U.N. related operations as examples, there are those conducted with forceful measures, as represented by the counterattack against Iraqi forces by the multinational forces with authorization from the U.N. Security Council on the use of force, at the time of the Gulf War, and there are those operations conducted without forceful measures where a ceasefire agreement exists. So far, Japan has been participating in traditional peacekeeping operations (PKOs) established by the United Nations where a ceasefire agreement is in place, and, at present, Japan ranks last among major countries in terms of the number of personnel dispatched to PKOs. One reason is that the Japanese Government restricts the use of weapons by SDF personnel participating in U.N. PKOs more strictly than international standards.

Even in traditional U.N. PKOs, which are conducted where a ceasefire agreement exists between conflicting parties, the United Nations approves the use of weapons for the purpose of defending its personnel (so-called "Type A" use) and for the purpose of removing obstructive attempts against U.N. PKO missions (so-called "Type B" use). However, under the Japanese International Peace Cooperation Law, SDF personnel are only permitted to use weapons for self defense, for protection of other SDF members at the site, and for protecting those "under their control" at the site, which is only part of Type A weapons use; they are not allowed to come to the aid of a geographically distant unit or personnel of other countries in the same mission under attack, or to use weapons, as necessary, to defend them. Furthermore, SDF personnel are not allowed to use weapons to remove obstructive attempts against them (Type B use).

As described above, even in the traditional U.N. PKOs, where the level of permitted weapons use is lowest, Japan applies standards that are far different from international standards on the use of weapons. Consequently, the SDF participating in UN PKOs has to act in accordance with standards that are different from those applied to the units of other

countries, even though they are engaged in joint operations. This makes it difficult for the SDF to participate actively in U.N. PKOs.

(2) Policy goals to be achieved

As described in Part I, Japan needs to contribute to joint efforts of the international community to maintain and restore international peace and security; this is not only the duty of Japan but also necessary to ensure Japan's own security through the improvements in the international security environment. Japan therefore should be more actively engaged in international peace operations.

It is true that it would require a fundamental political decision to enable the SDF to participate in international peace operations primarily for combat purposes, which would mean a significant change from the current policy. For other types of operations, however, Japan should consider more proactive participation. As operations such as U.N. PKOs are joint activities of the international community where the participating members are required to act in accordance with the same standards, Japan should make sure that its SDF participating in such operations can be engaged in joint activities along with the units and personnel of other countries by applying to the SDF the same international standards on the use of weapons. Specifically, it is first necessary to allow the SDF to come to the aid of a geographically distant unit or personnel of other countries that are engaged in the same U.N. PKO and other related activities, and to use weapons, if necessary, to defend them, in the event that such a unit or personnel are attacked (so-called "kaketsuke keigo"). Second, it is necessary to allow the SDF to use weapons (Type B use) to remove obstructive attempts against its missions in accordance with U.N. PKO standards. As to the first point, if the SDF does not come to the aid of units or personnel from other participating countries that are in danger and in need of help, solely because the SDF is not allowed to use weapons in such cases under Japan's unique standards, this is contrary to common sense and may be criticized by the international community. As to the second point, it is essential to allow such weapons use if the SDF is to participate in the so-called core activities of peacekeeping forces (PKFs).

(3) Restrictions imposed by the present legal basis

According to the hitherto maintained Government views, under Article 9 of the Constitution, Japan is permitted to exercise the right of individual self-defense so far as the three requirements for the right of self-defense are met, but is not allowed to use force in other cases. Under the current Government view, the SDF is permitted under the Constitution to use weapons to defend SDF personnel if they are attacked while being engaged in U.N. PKO and other similar activities, because such self-defense is justified by the inherent right (in a sense, a natural right) to protect oneself. The SDF, however, is not allowed to use weapons for so-called "kaketsuke keigo" or to resist attempts by others to prevent the SDF from discharging its duties, if the attacker is a state or a "quasi state organization", because the use of weapons in these cases might constitute use of force as prohibited under the Constitution.

(4) Options for addressing the restrictions

Article 9 of the Constitution prohibits "war as a sovereign right of the nation and the threat or use of force" as "means of settling international disputes" for Japan as an individual nation. Participation in activities under collective security, as well as PKOs

conducted by the United Nations and other international schemes to restore and maintain international peace, should not be considered prohibited by the Constitution, as the activities mentioned above are qualitatively different from what is prohibited by the Constitution. It is true that the collective security system as initially envisaged by the Charter of the United Nations, including the establishment of U.N. forces, has yet to be realized and that peace operations based on the U.N. Security Council resolutions are conducted on various levels. Although these activities are different from those conducted by individual countries, in the sense that they are joint undertaking by the international community, it must be conceded that each activity differs in terms of the degree of involvement by the United Nations. It is therefore necessary to make careful political consideration, on a case-by-case basis, regarding which operation the SDF should participate in. It is, however, at least clear that no country regards the use of weapons approved by the international standards of U.N. PKOs as use of force prohibited under the Charter of the United Nations. Therefore, the use of weapons by the SDF should not be regarded as constituting the use of force prohibited under Article 9 of the Constitution, where the weapons are used for “kaketsuke keigo” or to resist those who are attempting to prevent U.N. PKOs from discharging their duties in accordance with relevant international standards.

(5) Related matters

In the Asia-Pacific region, there is a unique feature in the peace operations that have been conducted in recent years, such as the Regional Assistance Mission in the Solomon Islands, the International Monitoring Team in Mindanao, and the Ache Monitoring Mission. These activities are not based on U.N. resolutions for various reasons, but they are peace operations conducted with the understanding of the related countries and they do not involve combat operations. The countries in the Asia-Pacific region and the international community expect Japan to make a more proactive contribution to the settlement of conflicts and to the maintenance and restoration of peace and security in the Asia-Pacific region, and such contributions are also desirable for Japan’s own security. It is therefore necessary to enable Japan to be able to participate actively in these peace operations that are not based on U.N. resolutions, if Japan is requested to do so.

4. Logistics Support for the Operations of Other Countries Participating in the Same U.N. PKO and Other Activities

(1) Actual situations in question

The Government has hitherto maintained that even though logistics support by the SDF to a unit of another country participating in the same U.N. PKO and other related activities, such as supply, transportation and medical services, does not in itself constitute the use of force, such support can be regarded as use of force by Japan and as contrary to the Constitution if the country being assisted is using force and if the logistics support is deemed as forming an integrated part of the use of force by the country to which the support is provided (“ittaika” with the use of force) because of factors such as the closeness of the support to the use of force. “Ittaika” with the use of force is a concept peculiar to Japan and poses difficult problems that are associated with it. For example, there are no clear criteria for deciding the degree of closeness of logistics support to the use of force by

other countries, and it is unrealistic to determine whether “ittaika” takes place or not in ever-changing situations on the ground. So far, the concept of “ittaika” has been applied widely in scope, and this has imposed undue restrictions on Japan’s logistics support activities in U.N. PKO or other peace operations, although this is where Japan can play an valuable role.

(2) Policy goals to be achieved

There are various ways in which Japan can contribute to joint activities undertaken by the international community--such as U.N. PKOs, and logistics support, including supply, transportation, medical services, construction and communication are areas in which the SDF, which excels in skills, equipment and organizational strength, can make a most important contribution. Japan should further enhance its contribution in this field, and the international community, too, has high expectations for Japan in this area.

(3) Restrictions imposed by the present legal basis

As mentioned above, the so-called “ittaika” theory argues that Japan’s logistics support activities, such as supply, transportation and medical supply, that in themselves are not use of force, will be deemed use of force as prohibited under the Constitution if the support is provided to a unit from another country that uses force and if certain factors, such as closeness between the support and the use of force, are found to exist. It is, however, by the very nature of the matter not possible to determine objectively how closely these support activities are related to the use of force by other countries because of the lack of objective criteria concerning this concept. This has imposed undue restrictions on the actual operation of Japan’s logistics support activities, making it difficult to achieve the policy goal described in (2) above.

The concept of “ittaika” began to be used in the context of Japanese logistics support activities conducted under the Japan-U.S. Security Treaty. It was argued that it would be deemed an exercise of the right of collective self-defense, as prohibited under the Constitution, if these activities were conducted as an integrated part of the use of force by U.S. forces. However, if one takes the logic of “ittaika” far enough, granting the use of Japanese facilities and areas to the U.S. forces could be deemed “ittaika” with the use of force by the United States, if, in the event of contingency in the Far East, the U.S. forces use any of these facilities and areas for the purpose of military combat operations under Article 6 of the Treaty. This might lead to an unreasonable conclusion that the Treaty itself constitutes a breach of the Constitution.

Japan’s provision of logistics support to the activities of the U.S. forces in a “situation in areas surrounding Japan” improves deterrence, which is desirable for the security of Japan. The concept of “ittaika,” however, would impose restrictions on this aspect as well.

(4) Options for addressing the restrictions

The following options are available for solving this problem. The first is to limit the application of the concept of “ittaika” to “ittaika” with “use of force as means of settling international disputes,” which is clearly prohibited under the Constitution. The second is to abolish the concept of “ittaika” and to decide on the provision of logistics support to peace operations conducted by other countries and the extent to which the support is provided, from the viewpoint of policy appropriateness. The third is to adopt an interpretation that

collective security and similar international peace operations are not activities prohibited under Article 9 of the Constitution and that the use of weapons in such international missions does not constitute the “use of force” prohibited by Article 9 of the Constitution.

The root cause of the problem is that the Government has been maintaining, based on constitutional interpretation, that those activities of collective security or similar international peace operations might constitute the use of force banned under Article 9 of the Constitution because these activities are acts conducted by Japan, even if they are conducted within the above framework. The concept of “ittaiika” in the context of international peace operations is doubly problematic because this concept not only confuses the use of weapons by a foreign military unit in international peace operations with the “use of force” by an individual state, but also deems cooperation with such a foreign unit illegal.

It should be considered that the third option will fundamentally solve “ittaiika”-related problems concerning logistics support to activities such as PKOs, because the use of weapons by the SDF in accordance with relevant international standards while participating in international peace operations would not constitute the “use of force” banned under Article 9 of the Constitution; this will also remove the potential allegation that logistics support given by the SDF is a violation of Article 9 of the Constitution because it is “ittaiika” with the use of force by a foreign military unit. Even before reaching this fundamental solution, this problem could be solved by means of the second option, namely deciding on logistics support from the viewpoint of policy appropriateness.

Part III. The Panel's Basic Understanding of Article 9 of the Constitution

1. Opinions on the Four Cases and their Premise

The Panel examined the four cases presented by former Prime Minister Abe, namely, (1) defense of a U.S. naval vessel on the high seas; (2) interception of a ballistic missile that might be on its way to the United States; (3) use of weapons in international peace operations; and, (4) logistics support for the operations of other countries participating in the same peace operations, such as U.N. PKOs, to ascertain whether it is possible for Japan to ensure its security and make sufficient contribution to international peace and security, which in turn is indispensable for Japan's own security, by maintaining the Government's current constitutional interpretation and the legal system based thereon.

The main points of the opinions shared among the members of the Panel in the process of the examination were detailed in Part II. The Panel, as described in Part I, confirmed its basic understanding that the security environment of the 21st century is significantly different from that immediately after the end of World War II when the Constitution of Japan was enacted, and also from that in the Cold War era when various interpretations were presented by the Government regarding the Constitution. The Panel further confirmed that the security environment of the 21st century is also different from that immediately after the end of the Cold War. Based on this recognition, the Panel has reached the conclusion that Japan cannot appropriately deal with the important issues arising in today's security environment as specified in the aforementioned four cases, if it continues to maintain the hitherto held constitutional interpretation. It is therefore necessary to make minimum and required changes to the constitutional interpretation in order to make it compatible with today's security environment and the common sense shared within the international community. In changing the interpretation, however, the following two prerequisites must be satisfied. First, Japan should maintain the basic principles laid down in the Constitution, the ideals of promoting peace and international cooperation. Second, Japan should make clear, as will be shown in the specific recommendations described in Part IV, that, under its new security policies, it will impose certain restrictions on its exercise of the right of collective self-defense, as well as on its participation in collective security activities under the United Nations and other frameworks.

2. Interpretation of Article 9 of the Constitution

The Panel mainly discussed the interpretation of Article 9 of the Constitution. Here, before making specific recommendations, it would be useful to summarize the Panel's basic views about the interpretation of this article. According to the hitherto held interpretation by the Government, Japan possesses the right of individual self-defense under international law and is allowed by the Constitution to exercise this right if certain requirements are met. On the other hand, the Government has maintained that Japan possesses the right of collective self-defense under international law as well, but is prohibited by the Constitution to exercise this right. Furthermore, the Government's view is that, regarding various activities conducted under the collective security system based on

the Charter of the United Nations, even though there is room for further consideration, Japan is not allowed to take actions that are deemed use of force or threat of force prohibited under Article 9 of the Constitution. Judging from the answers given by the Government in the Diet and its written answers given to written questions submitted by Diet members, the Government's interpretation is based on the following fundamental views.

The Government has stated, "The provisions of Article 9 of the Constitution seem to prohibit Japan completely from using force in international relations, but in light of the preamble of the Constitution which confirms the right of the Japanese people to live in peace and Article 13 of the Constitution which states that people's right to life, liberty, and the pursuit of happiness shall be the supreme consideration in legislation and in other governmental affairs, the government interprets that Article 9 of the Constitution does not prohibit Japan from using minimum and necessary force to remove the risk caused to the people's lives and persons by an armed attack from the outside." (Written answer given in the Diet by the Government on June 18, 2004) Based on this basic view, the Government has consistently held that the exercise of the right of collective self-defense and the use of force under the collective security system exceed the use of "minimum and necessary" force and are thus not allowed under the Constitution. In other words, Article 9 of the Constitution literally "seems to prohibit Japan completely from using force in international relations," but in light of the preamble and Article 13 of the Constitution, it does not prohibit Japan from exercising its right of individual self-defense.

When interpreting any written laws including the Constitution, the literal meaning of the provisions are always of primary importance, but at the same time, it is necessary to consider the overall context of the law, such as the background that led to the enactment, the basic national strategies, and social, economic and other related circumstances of the time. In addition, if a specific provision relates to international relations, it is of course necessary to consider such factors as the meaning in international law of concepts and terms specified in that provision and the dynamics of international relations of the time. Since the Constitution is the basic law of Japan, it is essential to undertake such a comprehensive approach in its interpretation. Especially, the terms employed in Article 9 and the concepts relevant thereto, such as "war," "use of force," the "right of individual self-defense," the "right of collective self-defense," and "collective security," are originally concepts under international law, and they cannot appropriately be interpreted without sufficient understanding of international law and international relations.

The hitherto held interpretation that Article 9 only permits the minimum and necessary force required to protect Japanese citizens, namely the right of individual self-defense, seems to reflect international relations and Japan's domestic situation immediately after the end of World War II, when the Constitution was enacted, and the situation in the Cold War era. It is easily understandable that this constitutional interpretation well reflects the country's situation at a time when people were making strenuous efforts to rise from the ashes of defeat in war without allocating the country's scarce resources to military purposes. However, that interpretation is no longer appropriate in today's significantly different international situation and Japan's current position in the international community, as described in Part I and II, above.

3. Exercise of the Right of Collective Self-Defense and Participation in Collective Security Led by the United Nations

With regard to the literal interpretation of Article 9 of the Constitution, which the Government has consistently maintained, it is necessary to point out the following. As described above, the Government's interpretation starts from the basic assumption that Article 9 of the Constitution literally appears to prohibit Japan completely from using force in international relations. Article 9 of the Constitution actually says, however, "Aspiring sincerely to an international peace based on justice and order, 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. In order to accomplish the aim of the preceding paragraph, land, 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." In particular, the following part, "... forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes," does not seem to "prohibit Japan completely from using force in international relations." Rather, this provision literally means, "... forever renounce war as a sovereign right of the nation and the threat or use of force *as means of settling international disputes*," and it would be straightforward to interpret the provision from the literal reading that it does not prohibit Japan from exercising the right of collective self-defense--not to say the right of individual self-defense, nor from participating in collective security led by the United Nations. Article 9.1 of the Constitution renounces war, but the Constitution, which was enacted in 1946, was not the first war-renouncing law. The idea of renouncing war had evolved over the long history of the development of international law, including the Covenant of the League of Nations, the 1928 Pact of Paris for the Renunciation of War, and the Charter of the United Nations. Throughout history, however, there were no ideas expressed that negate the right of individual and collective self-defense or collective security. Rather, the idea of renouncing war developed under the system that prohibits individual countries from settling disputes by the use of force. It is based on the premise that the League of Nations or the United Nations settles international disputes through international cooperation by peaceful means or by forcible means under a collective security system. Against this backdrop, if Japan promises not to settle its own disputes by the use of force, it is supposed to participate actively in the maintenance and restoration of international peace. The Pact of Paris signed in 1928 states, "The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another." Article 9 of the Japanese Constitution was formulated on the basis of this provision.

If Article 9.1 of the Constitution means to forever renounce war as a sovereign right of the nation and the threat or use of force "as means of settling international disputes," and if it does not mean to prohibit Japan from exercising the right of individual and collective self-defense or from participating in collective security led by the United Nations, Article 9.2 of the Constitution, which states, "In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained," should be interpreted to mean that it does not prohibit Japan from maintaining military capability to exercise the right of individual and collective self-defense or from participating in collective security led by the United Nations, which are not prohibited under paragraph 1. The meaning of "The right of belligerency of the state will not be

recognized” stated at the end of Article 9.2, should be interpreted as meaning that Japan has neither recourse to war nor the right in relation to matters such as commencing or ending war, which were previously granted under international law in the past. This is a natural consequence of the fact that Japan renounces war as a sovereign right of the nation in Article 9.1, and Article 9.2 confirms this consequence. On the other hand, it is obvious that this will not affect Japan’s rights and obligations under international humanitarian law, such as the 1949 Geneva Conventions and the Additional Protocols.

4. Requirements for the Exercise of the Right of Self-Defense

As mentioned in Part I, the Government has maintained the interpretation that, Japan can exercise the right of self-defense only if the following three requirements are met: (1) there is an imminent and unlawful infringement against Japan; (2) there is no other appropriate means available to repel this infringement; and, (3) the use of force should be limited to the minimum and necessary level (written answer given in the Diet by the Government on September 27, 1985). The first requirement only envisages the right of individual self-defense, as demonstrated by the expression of “infringement against Japan.” If, however, Japan is to be allowed to exercise the right of collective self-defense, this part of the requirement has to be changed. Also, the concept of “imminent and unlawful infringement” stated in the first requirement is apparently different from the requirement for the exercise of the right of self-defense under the Charter of the United Nations. Article 51 of the Charter limits the requirement to an “armed attack” against a member state, based on lessons from history in which the right of self-defense was abused before World War II because of the vagueness of the requirement “imminent and unlawful.” There are some cases in which the right of self-defense may be exercised against “imminent and unlawful infringement” or against “the use of force that does not constitute an armed attack” under general international law, where the provision of the Charter is not applied for a certain reason, and such an exercise may be permissible as indicated in some pertinent international judicial precedents. However, it must be noted that such exercise is allowed only in extremely limited cases. In this connection, the expression “the right of self-defense in a minor case,” sometimes used in Japan to discuss the question of self-defense, is vague and not fully shared internationally. As background for the use of this expression, it can be pointed out that an order to the SDF to conduct defense operation is a prerequisite for Japan to exercise the right of self-defense under Japanese law and the Government has to follow extremely strict procedures in order to issue that order. The procedures include deliberation by the Security Council of Japan, followed by a Cabinet Decision, and then prior approval by the Diet. Under these procedures, it would be difficult for Japan to make an appropriate and timely response in an emergency situation before the order can be issued, and, thus, Japan would not be able to effectively respond to new types of threats, such as ballistic missiles and terrorism. It would be necessary to consider different forms of legal procedures that would enable Japan to respond promptly and effectively to these threats.

5. Possession and Exercise of the Right of Collective Self-Defense, and the Concept of International Conflicts

Regarding the right of collective self-defense, the Government expressed the view-- according to an answer given by the Government in the Diet on March 31, 1960, that Japan is not allowed, under the Constitution, to exercise the “core” part of the right of collective self-defense, which means to send expeditionary forces to remote foreign countries in order to defend them. However, the Government has provided no clear explanations regarding the “other” parts of the right, saying that there is no consensus among academic theories on this question. The Government’s current view on the right of collective self-defense was presented at deliberations in the Diet in 1972. In October 14 of that year, the government defined the right of collective self-defense as the right to “use force to counter an armed attack on a foreign country that is in a close relationship with Japan although Japan itself is not under attack,” and stated that Japan, as a sovereign state, naturally possesses the right of collective self-defense under international law, but it exceeds the range of self-defense approved by the Constitution for Japan to exercise that right as a sovereign right of the nation; Japan is therefore not allowed to exercise it.

Similarly, in a written answer given on May 29, 1981, the Government defined the right of collective self-defense as the right to “use force to counterattack an armed attack on a foreign country that is in a close relationship with Japan although Japan itself is not under direct attack,” and stated, “Japan, as a sovereign state, naturally possesses this right of collective self-defense under international law, but under Article 9 of the Constitution, Japan is allowed to exercise the right of self-defense within the minimum and necessary range to defend itself. The exercise of the right of collective self-defense goes beyond this level, and so Japan is not allowed to exercise the right under the Constitution.” The Government, however, has not provided any clear explanations on such questions as how the relationship between the “possession” and the “exercise” of the right is to be understood and why the exercise of the right of collective self-defense is prohibited under the Constitution while the right of individual self-defense is permitted. As a result, it seems that the Government has been unable to gain sufficient public understanding on this question.

Furthermore, the provisions of Article 9.1 of the Constitution, that the Japanese people forever renounce the threat or use of force “as means of settling international disputes,” means that Japan renounces use of force as an individual nation to settle international disputes in which it is involved as a party. It must be pointed out that Japan is, rather, expected to help settle international disputes among third countries through international peace operations conducted under the framework of the United Nations and other frameworks, if it is to follow the spirit of the preamble of the Constitution (“We believe that no nation is responsible to itself alone”).

6. Summary of Part III

Because the above issues were left unsolved and not clarified, the Government has been walking a tightrope, so to speak, in responding to security-related issues with interpretations that appear to be unsustainable in terms of both international and domestic law. Specifically, these are represented by the fact that because the exercise of the right of collective self-defense is prohibited, the government has been trying to respond to security issues by “expanding” the scope of the right of individual self-defense or by applying the provision on “protection of the SDF’s weapons and other equipment” stipulated in Article

95 of the SDF Law. However, it is not approved under international law to justify situations to be covered by the right of collective self-defense by expanding the scope of the right of individual self-defense. In addition, as Article 95 of the SDF Law is not intended for application to joint maritime operations with U.S. forces or to international peace operations, it is extremely inappropriate to invoke this provision in this context.

Part IV. Recommendations on Security Issues Pertaining to the Four Cases and Related Matters

The Panel, based on the aforementioned considerations, makes the following recommendations regarding the security issues in the four cases and related matters:

1. Recommendations on the Four Cases

(1) Defense of U.S. vessels on the high seas

As is clear from the deliberations of the Panel outlined in Part II, effective functioning of the Japan-U.S. alliance has become all the more important to protect the lives and property of the Japanese citizens in the increasingly severe security environment of the 21st century. For maintaining and strengthening mutual trust between the allies, it is essential that Japan be able to protect U.S. naval vessels when the latter are faced with danger during joint operations. The current constitutional interpretation and the provisions of related laws explain that there are cases where the defense of U.S. naval vessels is possible by exercising the right of individual self-defense, or by a “reflex effect” of SDF personnel protecting themselves or in “defense of SDF’s weapons and other equipment under Article 95 of the SDF Law”. However, under these interpretations, the SDF can defend U.S. naval vessels only in very exceptional cases and cannot respond in actual situations of missile attacks against those vessels. It must therefore be concluded that exercise of the right of collective self-defense needs to be permitted. It should be noted that exercise of the right of collective self-defense will be limited to cases that are closely related to the security of Japan.

(2) Interception of a ballistic missile that might be on its way to the United States

Japan cannot respond with sufficient effectiveness to this issue if it continues to maintain the hitherto held concept of the right of self-defense and the current domestic procedures. The missile defense system relies on closer coordination between Japan and the United States and, realistically, it is impossible to carve out that part which relates only to the defense of Japan. It would be detrimental to the Japan-U.S. alliance, the basic prerequisite for Japan’s security, if Japan did not shoot down a ballistic missile that might be on its way to the United States when Japan is capable of doing so. Such a situation must be avoided absolutely. As detailed in Part II, this issue cannot be solved by the current approach that relies on exercising the right of individual self-defense or police power. Therefore, this also needs to be dealt with by exercising the right of collective self-defense. The exercise of such a right in this case is inherently different from the active use of force in foreign territories, because such missile defense would normally be conducted above the high seas or areas close to Japan.

In addition, because a decision to initiate the missile defense system must be made within minutes or even seconds, an effective system is not possible while maintaining the hitherto established decision making process. Therefore, there is a need to set up procedures that would enable simple, clear and prompt action in response to missile attacks.

(3) Use of weapons in international peace operations

As mentioned in Part I, joint response by the international community to security related issues has become more prevalent, and it is becoming essential for Japan to be actively engaged in international peace operations, such as U.N. PKOs. This will not only contribute to the international community but also ensure Japan's own security, which is contingent upon international peace. At present, SDF personnel are only authorized to use weapons to "protect oneself" and to "protect SDF's weapons and other equipment" even in the traditional U.N. PKOs, where the level of weapons use is the lowest. The SDF is participating in peace operations with a different standard of weapons use from the generally accepted international standards, while the international standards allow the use of weapons to come to the aid of geographically distant personnel or units of other countries participating in the same U.N. PKO, or to remove obstructive attempts against the U.N. PKOs. If Japan's SDF did not help a unit or personnel of other countries asking for help because of Japan's unique standards, its position would be considered contrary to common sense and could result in international criticism. Article 9 of the Constitution prohibits Japan from using force "as means of settling international disputes" as an individual country, which is qualitatively different from using weapons in activities under the collective security arrangements and PKOs conducted by the United Nations and other international frameworks. Basically, the Constitution should be interpreted to permit participation in such activities under collective security, and such an interpretation should be adopted without delay. At least, the use of weapons by SDF personnel should follow international standards that include the case of so-called "kaketsuke-keigo," because PKOs conducted by the United Nations and other international frameworks are not activities of individual nations but are joint undertakings by the international community. However, even if Japan is allowed to participate in activities under collective security led by the United Nations, Japan does not need to participate in all of them. Japan can make policy decisions whether to participate in a particular activity in accordance with its national interests. Regarding participation in activities under the collective security system, Japan can make it clear that SDF units will not participate in operations that are primarily for combat purposes.

For the time being it is worth examining realistic measures to be taken before reaching the stage of allowing SDF to participate in activities under collective security in general. The Government has been presenting the view that use of weapons might be deemed use of force as prohibited under the Constitution when weapons are used against a "state or quasi-state organization" while at the same time admitting that use of weapons does not always constitute use of force as prohibited by Article 9 of the Constitution. On the other hand, the government has maintained that even if weapons are used against a "state or quasi-state organization," this would not constitute the use of force banned by the Constitution, if used in the following cases: (1) "the use of weapons under the right which would be called an inherent right for a SDF personnel to protect oneself" as provided for in Article 24 of the International Peace Cooperation Law and other relevant laws, and (2) "the use of weapons for the defense of SDF's weapons and other equipment" as provided for in Article 95 of the SDF Law. In light of the above, it would be useful to study further the concept of the "third type" of weapon use, in the process of deliberating on the comprehensive law, to cover various international peace operations, bearing in mind consistency with the views expressed by the Government in the past.

(4) Logistics support for the operations of other countries participating in the same operations, such as PKOs

As described in Part II above, the concept that logistics support is deemed use of force as prohibited by Article 9 of the Constitution if it is provided in “*ittaika*” with the use of force was originally discussed in the context of the Japan-U.S. Security Treaty. If, however, one follows the logic of “*ittaika*” far enough, granting the use of Japanese facilities and areas to U.S. forces would be deemed in “*ittaika*” with the use of force by U.S. forces, if, in the event of contingency in the Far East, the U.S. forces use any of these facilities and areas for the purpose of military combat operations under Article 6 of the Treaty. This might lead to an unreasonable conclusion that the Treaty itself constitutes a breach of the Constitution. Also, as pointed out in Diet deliberations of the U.N. Peace Cooperation Bill (later withdrawn), the International Peace Cooperation Bill, the Bill concerning Measures to Ensure the Peace and Security of Japan in Situations in Areas surrounding Japan, and the Anti-Terrorism Special Measures Bill, and the Bill Concerning the Special Measures on Humanitarian and Reconstruction Assistance in Iraq, the concept of “*ittaika*” is extremely difficult to apply to actual situations in the field, which can be ever-changing, as it is not clear under what circumstances logistics support is deemed to be an integrated part of the use of force by other countries and what the criteria are for “combat areas” and “non-combat areas.” Since this problem is related to both the operation of the Japan-U.S. Security Treaty and Japan’s participation in international peace operations it will be fundamentally solved by adopting the interpretation that the Constitution does not prohibit Japan from exercising the right of collective self-defense or from participating in collective security. Even before reaching this fundamental solution, Japan should abandon the hitherto held concept of “*ittaika*” which regards this issue as a matter of constitutional interpretation, as logistics support such as supply, transportation and medical services cannot, themselves, be regarded as the use of force. Regarding the relationship between such logistics support and the use of force by other countries, this question should be dealt with as a matter of policy appropriateness, and the decision of whether Japan should give logistics support to other countries, and to what extent such support should be given, should be made after comprehensive examination of the merits and demerits, including whether the proposed activities can be accepted by the Japanese people.

2. Restrictions to be Imposed on the New Security Policies (so-called “*hadome*”)

As mentioned above, the Panel examined what Japan should do to ensure its security and to be more active in contributing to the maintenance of international peace and security. As a result, the Panel has made recommendations regarding the four cases in question. The Panel’s recommendations include a proposal to change the constitutional interpretation to enable Japan to exercise the right of collective self-defense and participate in activities under collective security led by the United Nations. The Japanese public might be worried, however, that Japan, as an ally of the U.S., could be forced into many of the conflicts that the United States is party to if the right of collective self-defense is admitted. The public might also be concerned that Japan would have to participate in all international peace operations conducted as collective security measures. These are understandable concerns. In the recommendations made for each of the cases explained in Paragraph 1,

above, the Panel already referred to certain limits in the respective recommended measures. In the following, the Panel will set out clear restrictions on what Japan would not undertake under the proposed new security policies.

(1) Laws

When exercising the right of collective self-defense with regards to the defense of U.S. naval vessels and ballistic missile defense, relevant laws should stipulate the scope and procedures of the specific measures. For participation in international peace operations, such as U.N. PKOs, the mandates for the SDF, and procedures for and limits on the use of weapons, should be stipulated in a law, such as the comprehensive law for international peace cooperation. These procedures, however, should be decided in such a way so as not to hinder the exercise of the right of collective self-defense, which is truly required for Japan's security, or the legitimate use of weapons for the purpose of maintenance and restoration of international peace.

(2) Diet approval regarding the overseas dispatch of SDF units

Already, under the present International Peace Cooperation Law, the Government is required to obtain approval from the Diet when dispatching SDF units overseas for participation in peacekeeping force activities (so-called "PKF" core activities). If Japan is to participate in operations other than PKF activities where the use of weapons is highly probable, the approval from the Diet should also be obtained.

(3) Establishment of basic security policies

Regarding cooperation with the United States, an ally of Japan, in and for exercising the right of collective self-defense, basic principles should be established and presented to the public by means of such measures as cabinet decisions, to the effect that such cooperation is limited to those activities that are essential to maintain and enhance the credibility of the Japan-U.S. alliance and to contribute to Japan's security. With regard to participation in international peace operations based on collective security, too, basic policies should be established by means of similar measures to ensure, for instance, that Japan will decide whether to participate in these operations based on careful consideration of such factors as its national interest, capabilities, merits and demerits of participation, and the degree of public understanding, rather than simply and automatically participating in any operations based on U.N. Security Council resolutions. For instance, such basic principles could include the policy that SDF units will not participate in such operations with a mission that is primarily for combat purposes.

3. How to Formulate New Security Policies

Allowing Japan to exercise the right of collective self-defense and to participate in activities under collective security led by the United Nations would mean changing the hitherto held interpretation that Japan is only permitted to exercise the right of individual self-defense under Article 9 of the Constitution and the use of force beyond this right constitutes a breach of the Constitution. Some argue that this long-standing constitutional interpretation cannot be changed unless the Constitution itself is amended. The Panel, however, believes that the above change is possible by changing the constitutional

interpretation for the following reasons. First, Article 9 of the Constitution prohibits “war as a sovereign right of the nation and the threat or use of force as means of settling international disputes,” but it does not expressly prohibit Japan from exercising the right of collective self-defense, which it has as an inherent right under international law, or from participating in collective security measures under the Charter of the United Nations. Second, the hitherto held interpretation that Japan can only exercise the right of individual self-defense was expressed mainly in answers given by the Government in the Diet in response to individual issues the Government was facing, considering the security environment and political situations at those times. Third, the hitherto held interpretation was formulated over the course of history, reflecting the security environment and political situations of the past, and is no longer compatible with the realities of the end of the 20th century and the beginning of the 21st century, in which the security environment and political situations have dramatically changed. It is therefore necessary to change the interpretation, which the Government can do by presenting a new interpretation in appropriate form, but amendment of the Constitution or legislative measures are not necessary.

4. Conclusion

Security provides the basis for a nation’s existence. Without security, the nation cannot implement economic, social or other policies. As described in Part I of this report, the security environment surrounding Japan in the 21st century is far different from that in the middle of the 20th century, when the Constitution of Japan was enacted; the situation is also different from that in the Cold War era, when various interpretations were presented by the Government regarding Japan’s right of collective self-defense and other issues. The present security environment is also different from that immediately after the end of the Cold War. Nevertheless, national security policies must be formulated and implemented by the state based on the rule of law, with the Constitution being the supreme law. This legal basis, however, should also be reexamined constantly in light of the stark realities of the security environment. The Panel, based on this basic understanding, has examined the four cases in question and made the above recommendations to change the interpretation of Article 9 of the Constitution of Japan. The Panel believes it is necessary and possible for Japan to expeditiously implement these recommendations to ensure its security in the dramatically changing security environment of the 21st century.

As described in Part I, Japan’s basic security strategy is (1) to maintain effective defense capability through its own efforts; (2) to maintain and enhance the Japan-U.S. alliance based on the Japan-U.S. Security Treaty; and, (3) to contribute to the joint efforts of the international community to settle disputes in various parts of the world and maintain and restore international peace and security as Japan’s responsibility toward the international community and as a means to improve its own security environment. The Panel believes that the recommendations made in this report will certainly contribute to Japan’s own security in this sense without imposing an extra burden on Japan.

Finally, it is the Panel’s expectation that the recommendations on the use of weapons in international peace operations and those on logistics support will be realized in the process of enacting the so called Comprehensive Law currently under consideration by the government and the ruling parties.

Report of the Advisory Panel on Reconstruction of the Legal Basis for Security

(SUMMARY)

This Advisory Panel was tasked by former Prime Minister Shinzo Abe to reexamine the current legal basis for Japan's national security in the light of changes in the security environment surrounding Japan. The former Prime Minister specifically requested the Panel to examine the following four cases, namely; (1) Defense of U.S. naval vessels on the high seas, (2) ballistic missile defense, (3) use of weapons in international peace operations such as PKOs, and, (4) logistics support for the activities of other countries in peace operations. It should be noted that, basically, cases (1) and (2) relate to the right of self-defense and cases (3) and (4) relate to international peace operations.

The panel, after examining these cases in detail, presents the following recommendations, which include relevant points of constitutional interpretation.

The Security Environment surrounding Japan and the Panel's Basic Understanding of Article 9 of the Constitution

It would be useful at the outset to outline the Panel's basic understanding of the security environment surrounding Japan and Article 9 of the Constitution, as follows:

Japan's security environment has significantly changed over time: the situation in the 21st century is undoubtedly different from the security environment that prevailed immediately after World War II when the Constitution was enacted. Moreover, it has changed greatly from the Cold War era when the government presented various constitutional interpretations, and, it also differs from the security environment after the Cold War. In addition to these changes arising from international circumstances, Japan's own situation has also significantly changed, and Japan's enhanced position in the international community has resulted in greater responsibilities as well. In response to these changes, the legal basis for Japan's security, including the Constitutional interpretation, must be constantly reexamined.

Several features can be pointed out with regard to the security environment of the 21st century. First, security threats have diversified, as seen in the proliferation of nuclear weapons and other weapons of mass destruction, as well as ballistic missiles, and the expansion of international terrorism. Second, concerted efforts by the international community on security related issues have become more prevalent, with the decisions of the U.N. Security Council playing an increasingly important role and international peace operations initiated by U.N. resolutions and other measures becoming more actively employed in various parts of the world.

It is necessary to reexamine Japan's security policy and its legal basis for security from these perspectives.

While the need for Japan to continue its own efforts to ensure its security has never diminished, it is at the same time necessary for Japan to maintain and further enhance the effectiveness of the Japan-U.S. alliance. It should especially be borne in mind that in recent years Japan and the United States have conducted joint operations of Aegis-equipped vessels to trace North Korean missiles. Furthermore, expectations are high for Japan to strengthen cooperation with the United Nations and the international community in the field of peace operations.

Under these circumstances, however, it is becoming difficult for Japan to respond appropriately to the crucial issues in today's security environment as set out in the above-mentioned four cases while maintaining the constitutional interpretations held hitherto by the Government. Adherence to the current views would certainly result in a series of legally unsustainable treatment of the security issues. It is therefore absolutely necessary for Japan to adopt new interpretations that are consistent with the changes in the security environment while maintaining the legal integrity and international acceptability.

When interpreting any written laws, including the Constitution, the literal meanings of the provisions are always of primary importance. At the same time, however, it is necessary to consider the context of the law, the background that led to its enactment, the basic national strategies and social, economic and other requirements of the time. Since the Constitution is the most basic law of Japan, it is extremely important to pursue such a comprehensive approach when exercising interpretation. It should especially be noted that the terms employed in Article 9 of the Constitution and the concepts relevant thereto, such as "war," "use of force," "right of individual self-defense," "right of collective self-defense," and "collective security," are originally concepts established under international law, and, accordingly, they cannot be appropriately interpreted without sufficient understanding of international law and international relations.

The interpretation hitherto held by the Government, that Article 9 only permits minimum and necessary use of force to protect Japanese citizens, confining use of force to an exercise of the right of individual self-defense, seems to reflect the national sentiment of the time when the Constitution was enacted, the prevailing international relations, and Japan's domestic situation immediately after the end of World War II, as well as the ensuing period of the Cold War. However, such an interpretation is deemed no longer sustainable in today's significantly changed international situation and in light of Japan's current position in the international community. Rather, Article 9 should be interpreted to permit the exercise of not only the right of individual self-defense but also the right of collective self-defense, and to allow participation in collective security efforts under the United Nations.

In particular it should be noted that, with regard to the right of collective self-defense, the explanation given by the Government in the Diet in 1960 states that Japan is not allowed to exercise the "core" part of the right of collective self-defense, which means sending expeditionary forces to remote foreign countries in order to defend them. However, no clear explanation has been provided by the Government with regard to "other" parts of that right. In

1972, the Government presented the statement to the Diet that, while it is undoubtedly clear that Japan, as a sovereign state, “possesses” the inherent right of collective self-defense under international law, the “exercise” of that right is not permitted under the Constitution. A similar statement was presented in the Diet again in 1981. The Government, however, has not provided clear explanations as to how the relationship between the “possession” and “exercise” of that right is to be understood and why the exercise of the right of collective self-defense is prohibited under the Constitution while permitting individual self-defense to be employed. As a result, it seems that the Government has failed to gain sufficient understanding of the public on these points.

Article 9 of the Constitution prohibits the use of force as a means to settle international disputes. It should be understood under this provision that Japan renounces the use of force, conducted as an individual nation, in order to settle international disputes in which it is involved as a party. On the other hand, the Constitution provides for clear expectations, discernible in light of the spirit of the Preamble, that Japan should actively cooperate in solving international disputes among third countries through participation in international peace operations under the framework of the United Nations and other international mechanisms.

Because the above issues were left unresolved and ambiguous, the Government has been walking a tightrope, so to speak, in responding to security related issues by adopting constitutional interpretations that are clearly unsustainable both in domestic law and international law. Specifically, because the exercise of the right of collective self-defense is prohibited, Japan has been trying to respond to its security needs by “expanding” the right of individual self-defense and by extending application of the provision on the “protection of the SDF’s weapons and other equipment” of Article 95 of the Self Defense Forces Law. Under international law, however, it is not permitted to expand the scope of application of the right of individual self-defense in order to justify use of force that falls under the right of collective self-defense.

Recommendations on the Four Cases

Based on these considerations, the Panel makes the following recommendations on the four cases assigned for examination.

1. The defense of US naval vessels on the high seas: In order to protect the lives and property of Japanese citizens in today’s increasingly difficult security environment, effective functioning of the Japan-U.S. alliance is becoming even more important. It is essential for the maintenance and strengthening of mutual trust that Japan be able to protect U.S. naval vessels when the latter face danger during joint operations. The current Constitutional interpretation and the provisions of relevant laws explain that the defense of U.S. vessels is possible by exercising the right of individual self-defense, or by a “reflex effect” of “SDF personnel protecting oneself” or the “defense of SDF’s weapons and other equipment under Article 95 of SDF Law.” However, under these interpretations, the SDF would be able to defend U.S. naval vessels only in very exceptional cases and would not be able to respond effectively to the actual situations of missile attacks against the vessels. Therefore, the exercise of the right of collective self-defense must be permitted. It should be noted that the such an exercise of the right of collective self-defense

would be limited to cases that are closely related to the security of Japan.

2. The interception of ballistic missile that might be on its way to the United States: Japan cannot respond effectively enough to such missiles with the hitherto held concept of the right of self-defense and the current approval procedures stipulated in the relevant domestic law. The missile defense system relies on closer coordination between Japan and the United States and, realistically, it is impossible to isolate the part that relates only to the defense of Japan. It would be detrimental to the Japan-U.S. alliance, a basic prerequisite for Japan's security, if Japan did not try to shoot down a ballistic missile potentially on its way to the United States even though Japan was capable of doing so. Such a situation must be avoided absolutely. As this issue cannot be solved by the current approach that relies on exercising the right of individual self-defense or police power, this also needs to be dealt with by exercising the right of collective self-defense. The exercise of such a right in this case is inherently different from the active use of force in foreign territories because such missile defense would be normally conducted above the high seas or above areas closer to Japan.

3. The use of weapons in international peace operations: Currently, SDF personnel deployed to U.N. PKOs and other peace operations are authorized to use weapons only to "protect oneself" and "protect SDF's weapons and other equipment." According to the current constitutional interpretation and the provisions of relevant laws, the use of weapons by the SDF when used against a "state or quasi-state organization" is not authorized because it could be deemed use of force that is prohibited under the Constitution, even in operations such as UN PKOs. The SDF is therefore participating in peace operations with a standard for the use of weapons that differs from the recognized international standards, which allow, for instance, the use of weapons for coming to the aid of geographically distant personnel or units of other countries participating in the same U.N. PKO, so called "kaketsuke keigo," or for protecting UN PKO missions from any attempt to obstruct them. This differentiated standard is contrary to common sense and could result in international criticism. Interpretation of the Constitution should recognize that participation in international peace operations, such as U.N. PKOs, is not prohibited by Article 9 and should recognize that use of weapons is permitted not only "to protect oneself" but also to come to the aid of geographically distant personnel and units and to remove obstructive attempts against the mission. Such a change in the interpretation, however, does not mean that the SDF units will participate in operations primarily for combat purposes.

4. Logistics support for the operations of other countries participating in the same U.N. PKOs and other activities: Under the hitherto held interpretation of the Constitution, logistics support is deemed use of force prohibited by Article 9 of the Constitution if such support is given in "ittaika" ("to form an integral component of") with the use of force by other countries. However, the concept of "ittaika" is extremely difficult to apply to actual conditions in the field, which can be constantly in flux, as the circumstances under which logistics support is deemed constituting an "integral" part of the use of force by other countries and what the criteria are for "combat zones" or "non-combat zones" are not clear. This problem will be fundamentally solved by adopting the interpretation that the Constitution does not prohibit Japan from exercising the right of collective self-defense or from participating in collective security. Even before reaching this fundamental solution, Japan should abandon the hitherto held concept of "ittaika" that regards this issue as a matter of constitutional interpretation, as logistics support, such as supply, transportation and medical services, cannot be regarded by themselves as use of

force. As regards the relationship between such logistics support and use of force by other countries, it should be dealt with as a matter of policy appropriateness. Whether Japan should give logistics support to other countries and the extent to which such support should be given should be decided after comprehensive examination of the merits and demerits of the exercise, including consideration as to whether the Japanese people can accept the activities to which the support is given.

New Security Policies and Their Legal Basis

The recommendations presented above include changing the constitutional interpretation to allow exercise of the right of collective self-defense and participation in U.N. collective security. This change in constitutional interpretation can be made by the Government presenting the new interpretation in an appropriate form and does not require amending the Constitution. On the other hand, it is understandable that this could create certain concern among the public. Although the Panel has already referred to limits on the respective recommended measures, the following are means to set out clear restrictions with regard to what Japan would not undertake under the new security policies.

First, restrictions would be imposed under laws to be newly established. When exercising the right of collective self-defense with regards to the defense of U.S. naval vessels and ballistic missile defense, the relevant laws should stipulate the scope and procedures of the measures. For participation in international peace operations, the mandates for the JSDF, and procedures for and limits on the use of weapons should be stipulated in a law, such as the so-called comprehensive law for international peace cooperation.

Second, Diet approval would be required. Already under the present International Peace Cooperation Law, the Government is required to obtain prior approval from the Diet in order to dispatch SDF units overseas for participation in the so-called “core activities” of the peacekeeping forces (PKF). If Japan is to participate in operations other than PKF activities where the use of weapons is highly probable, approval from the Diet should also be obtained.

Third, basic security policies would be established. Regarding cooperation with the United States in exercising the right of collective self-defense, the underlining basic principles should be established and presented to the public by such measures as cabinet decisions, to the effect that such cooperation is limited to those activities that are essential to maintain and enhance the credibility of the Japan-U.S. alliance and to contribute to Japan’s security. With regard to participation in international peace operations based on collective security, the basic principles should be established by means of similar measures to ensure, for instance, that Japan will decide on participation in these operations only after carefully considering its national interest and capabilities, the merits and demerits of participation, and the degree of public understanding and support, rather than simply and automatically agreeing on participation in any operations based on U.N. Security Council resolutions. Such basic principles can include the policy that SDF units will not participate in operations primarily designed for combat purposes.

The basic security strategy of Japan is: (1) to maintain effective defense capability through its own efforts; (2) to maintain and enhance the Japan-U.S. alliance based on the Japan-U.S. Security Treaty; and, (3) to contribute to the joint efforts of the international community to

settle disputes in various places around the world with a view to maintaining international peace and security, which will facilitate the fulfillment of Japan's responsibility toward the international community while at the same time improving its own security environment. In this sense, the Panel believes that the recommendations presented in this report will certainly, and primarily, contribute to strengthening Japan's own security without imposing an extra burden on Japan.

It is the Panel's expectation that the recommendations on use of weapons in international peace operations and those on logistics support will be realized in the process of enacting the so-called Comprehensive Law currently under consideration by the Government and the ruling parties.

References

(Translation)

Advisory Panel for Reconstruction of the Legal Basis for Security

April 17, 2007
Prime Minister's Decision

1 Purpose

In light of the changing security environment surrounding Japan, it is necessary to reconstruct the legal basis for security so as to make it more effective and consistent with these changes. The “Advisory Panel for Reconstruction of the Legal Basis for Security” (hereafter referred to as “the Panel”) will be convened under the Prime Minister to examine, by looking at specific cases, issues of the Constitution, including those related to the right of collective self-defense.

2 Composition and administration of the Panel

- (1) The Panel will consist of experts listed in the attachment and the Prime Minister will convene its meetings.
- (2) The Prime Minister will request one of the experts to be a chair.
- (3) Where necessary, the Panel may request attendance of concerned parties other than the members.
- (4) Administrative affairs of the Panel will be handled by the Chief Cabinet Secretary, assisted by a Deputy Chief Cabinet Secretary and managed by the Cabinet Secretariat.

Note: Attachment omitted

Members of “Advisory Panel for Reconstruction of the Legal Basis for Security”
(As of June 24, 2008)

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Hisahiko Okazaki

Director, The Okazaki Institute

Noriyuki Kasai

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Osamu Nishi

Professor, Komazawa University

Tetsuya Nishimoto

Former Self-Defense Forces Joint Staff Council Chairman

Shinya Murase
Professor, Sophia University

Shunji Yanai
Judge, International Tribunal for Law of the Sea

Meetings of “Advisory Panel for Reconstruction of the Legal Basis for Security”

First meeting, May 18, 2007

Topic: (1) Remarks by Prime Minister (2) Administration of the Panel (3) Comments from the members

Second meeting, June 11, 2007

Topic: Defense of U.S. Naval Vessels on the High Seas

(1) Presentation from the government (2) Discussions

Third meeting, June 29, 2007

Topic: Interception of a Ballistic Missile that might be on its Way to the United States

(1) Presentation from the government (2) Discussions

Fourth meeting, August 10, 2007

Topic: The Use of Weapons in International Peace Operations

(1) Presentation from the government (2) Discussions

Fifth meeting, August 30, 2007

Topic: Logistics support for Operations by other Countries Participating in the Same U.N.PKO and other activities

(1) Presentation from the government (2) Discussions

Discussions, April 11, 2008

Topic: (1) Discussions (2) Rough draft Report

Discussions, June 23, 2008

Topic: Draft Report

Submission of the Report, June 24, 2008

Opening remarks by the then Prime Minister Abe at the First meeting of the
“Advisory Panel on Reconstruction of the Legal Basis for National Security” on
May 18, 2007

Despite the end of the Cold War, with issues such as the development of nuclear weapons and ballistic missiles by North Korea, international terrorism, and regional conflicts occurring frequently in various parts of the world, the security environment surrounding Japan has rather become markedly severer. As Prime Minister, I have the duty to establish a more effective security framework to be able to deal with these issues.

Furthermore, the need for Japan to be more actively involved in international peace operations such as PKOs is self-evident, as Japan’s peace and stability is contingent upon the peace and stability of the world.

It is important more than ever, for the Japan-U.S. alliance to function more effectively to protect the lives and property of Japanese citizens. The alliance will not stand without strong mutual trust, and I believe, as I have stated on various occasions, important issues such as the following need to be examined.

First, suppose Japanese Maritime Self Defense Force (JMSDF) vessels are engaged in joint operations such as joint training in the vicinity of U.S. naval vessels on the high seas. In the event of an attack against U.S. naval vessels during such exercise, can the JMSDF vessels be put in a position where they are not allowed to do anything for the U.S. vessels?

Second, it is without doubt that if the United States, an ally of Japan, suffers substantial damage by ballistic missile attacks, this will seriously affect Japan’s own defense. Despite this fact, setting aside the questions of technological capabilities, can Japan be put in a position where it is not allowed to intercept ballistic missiles that might be on their way to the United States even when the missiles are detected by the radar systems of the Self Defense Force (SDF)?

I also have to point out that there are obstacles for Japan to become more actively engaged in PKOs and other international peace operations. If Japanese personnel cannot act under the same standard as that followed by personnel from other countries participating in the same international operation and cooperate closely with them as team members, Japan would not be able to gain confidence nor could it conduct effective activities. From such perspectives, I believe the following important issues need to be examined.

The first is the issue of the use of weapons in international peace operations. For instance, if units or personnel of other countries engaged in the same PKO or other similar activities are attacked, other units or personnel can of course come to the site and help them by using weapons if needed. Can the Japanese personnel be put in a position where they are not allowed to take such actions, while personnel of any other countries can do so as a matter of course?

The second is the issue of the logistics support to other countries participating in the same

PKOs or other international peace operations. Even though activities such as supply, transportation and medical services are not in themselves “use of force”, the current constitutional interpretation does not allow such support if it is provided in a manner that forms an “integral part” of use of force by other countries (This interpretation is known as the concept of “ittaika” with the use of force.). Is it appropriate to continue to apply this concept to logistics support activities?

At the same time, when considering these cases to establish a new security policy based on the new circumstances of today, it is important to make clear to the Japanese public what Japan would and would not do in this new era. Also, I ask the Panel to bear in mind the hitherto held government’s views on these issues.

I expect that the members of the Panel, while bearing in mind these aspects, will have candid discussions and make recommendations about the best directions to take to protect the security of our nation.