International Straits: An issue concerning Japan's ratification of the United Nations Convention on the Law of the Sea

Yutaka Kawasaki

Introduction

The Agreement for the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 1982, adopted on 28 July 1994,[1] paved the way for ratification or accession to the Convention for previously reluctant industrialised countries. Japan has therefore started working on preparation for ratification of the Convention. The task of promulgating new laws and regulations and altering existing ones is expected to be strenuous.[2]

One of the most affected statutes is the Law on the Territorial Sea of 1977.[3] The law, which defines Japan's territorial sea regime, specially designates that the five most important straits around the nation should have a 3 nautical miles (nm) breadth of territorial sea,[4] while elsewhere it is set at twelve nautical miles. The special treatment of these straits is, as the following discussion reveals, the product of a difficult situation unique to Japanese domestic politics and has been a subject of bitter debate in the Japanese Diet. Imminent review of the law will again stir up the old dilemma and the outcome may be significant.

History of Japan's Territorial Sea

Three-Mile Territorial Sea: Reliance on Customary Law

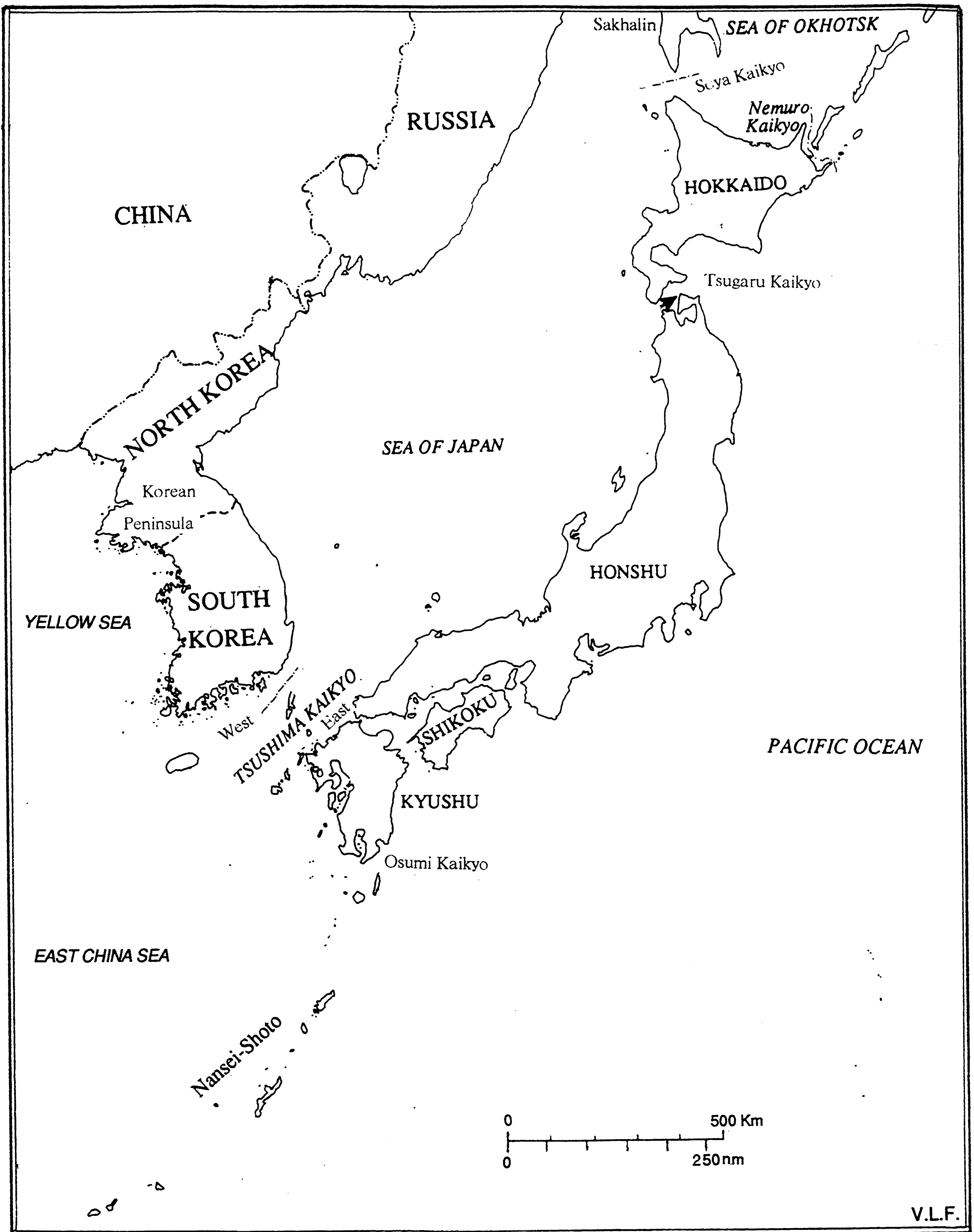
The first incident that prompted Japan to declare its territorial sea is the Franco-Prussian War. In 1870, the Japanese *Dajokan* (equivalent to today's cabinet) declared Japan's neutrality and ordered the belligerent parties to refrain from military activity within three miles from its shore.[5] Since that declaration and until the enactment of the Law on Territorial Sea in 1977, Japan has maintained that it had sovereignty over its surrounding sea up to three miles from the shore. However, formal legislation to establish the regime of territorial sea was never carried out by successive governments. This was because of their understanding of international law concerning the law of territorial sea. Japanese governments during this period maintained that the regime of territorial sea and, in particular, the breadth of territorial sea was determined by international customary law to be three miles from the shore. Therefore, according to their understanding, there was no need for individual states to enact specific legislations to that effect.

In 1968, during Diet discussions regarding accession to the Convention on the Territorial Sea and the Contiguous Zone of 1958,[6] a government representative reaffirmed Japan's understanding on the international law of territorial sea. He told the Diet:

> *"(a) International customary law does not permit states to decide arbitrarily on the breadth of their territorial sea; and,*
>
> *(b) The 1958 Convention codifies the customary international law concerning the regime of territorial sea. The (First) United Nations Conference failed to reach an agreement on universally acceptable limit of the territorial sea and hence no provision was made in the Convention. Therefore, the customary law existed before the conference is still valid: namely, in the absence of evidence such as historic claims to the contrary, the limit of territorial sea should normally be three miles from the baseline."*[7]

This position stressed by the government was already outdated at the time of the discussion. Two important developments must be pointed out in this regard. One is in the legal sphere, that is, failure of the United Nation's effort to establish unified rule of the breadth of the territorial sea. The other is on the evidence, that is, state practice.

The (First) United Nations Conference on the Law of the Sea was convened in 1958 to codify the customary law regarding the law of the sea. However, it failed to achieve compromise on the critical issue, namely, the breadth of the territorial sea. A majority of developed states clung to three- or four-mile limit because they had vested interests in shipping and other uses of the sea. A significant


Sakhalin
SEA OF OKHOTSK
Kaikyo
Nemuro Kaikyo
RUSSIA
HOKKAIDO
CHINA
Tsugaru Kaikyo
NORTH KOREA
SEA OF JAPAN
Korean Peninsula
HONSHU
SOUTH KOREA
YELLOW SEA
TSUSHIMA KAIKYO
West
East
SHIKOKU
PACIFIC OCEAN
KYUSHU
Osumi Kaikyo
EAST CHINA SEA
Nansei-Shoto
0
500 Km
0
250nm
V.L.F.

number of states, however, claimed broader limit for their territorial sea. The Second United Nations Conference on the Law of the Sea convened in 1960 especially to deal with the issue but it too failed to reach a consensus. From the 1950s and on, the number of states that claim jurisdiction to waters beyond three miles from the shore kept increasing. This fact eroded the theoretical base for the claim that a three-mile limit is the established norm of international customary law. After the failure of the Second United Nations Conference, a number of states declared an exclusive fishing zone outside their territorial sea to a distance up to twelve miles from the shore. Notably, almost all the new coastal states that achieved independence in this period claimed a twelve-mile territorial sea.[8]

It is in this context that the Third United Nations Conference on the Law of the Sea took place. In the course of negotiations in the conference, a package of (a) twelve-mile limit for the breadth of territorial sea, (b) 200-mile limit to coastal states' jurisdiction over adjacent waters, and (c) the right of transit passage in regard to international straits gained popularity. Furthermore, some developed states, notably Canada, France and Spain, declared extension of their territorial sea to twelve miles from the shore. By the mid-1970s when Japan began preparing its legislation on territorial sea, the government's proposition that three mile limit is the norm of customary law had lost much of its persuasiveness.

Change in Policy

Another factor that forced Japanese government to rethink its position over the territorial sea was an increasing threat of foreign fishing activities near its shores felt by the domestic fishing industry. Soviet vessels began fishing near the Japanese territorial sea around 1955, and their activities intensified after the introduction of large-scale trawl and seine net fishing boats in 1968.[9] The Soviet action, along with similar activities by Korean vessels, stirred up strong protest among the Japanese fishing industry. By 1975, the industry representatives were united in pressing the government to take measures to prevent the adverse effect of these activities. They demanded a strong diplomatic initiative to drive out these vessels, compensation for the damage caused by the reduced catch, and the proclamation of a twelve-mile limit for the territorial sea.[10]

Despite mounting pressures from the fishing industry, the government was reluctant to claim the twelve-mile territorial sea. A government representative explained that he was closely watching the progress of negotiations at the Third United Nations Conference on the Law of the Sea with the intention of seizing the best opportunity to declare extension of the limit of territorial sea to twelve miles.[11]

It became clear, however, that the trend toward twelve-mile territorial sea was irreversible as some advanced states followed the developing states' initiative by setting a twelve mile limit to their territorial sea. In 1976, the government finally submitted to domestic pressure and decided to establish the twelve-mile territorial sea. On 2 February 1976, Prime Minister Miki told the Diet of his government's decision in the following terms:

> *"(a) It* [the government] *will endeavour to establish twelve-mile territorial sea before the end of the year regardless of progress made at the Third United Nations Conference on the Law of the Sea.*
>
> *(b) Regardless of what the agreed results of the Conference on the regimes of territorial sea and international straits be, it will adhere to the three non-nuclear principles."*[12]

The Law on Territorial Sea of 1977

The Law on Territorial Sea, coupled with the Law on Provisional Measures relating to the Fishing Zone, was adopted on 2 May 1977.[13] The law has only two articles, one provides for the extension of territorial sea and the other lays down rules concerning the baseline, and three supplementary provisions.[14] The second supplementary provision of the Law provides that, *"for the time being"*, the breadth of territorial sea concerning five straits linking the Sea of Japan with the Pacific Ocean and the East China Sea, termed *"the designated areas"*,[15] would be frozen at three miles. This provision was designed to avoid a difficult situation that would occur if the twelve mile limit was introduced uniformly. The extended territorial sea would include these straits inside it, causing foreign vessels travelling through them to exercise the right of innocent passage. If such vessels were equipped with nuclear weapons, it was argued, it may contradict with the third of the three non-

nuclear principles, namely, Japan would not allow any nuclear weapons into its territory.

The problem of Soviet nuclear warships passing through these straits *en route* to the Pacific Ocean or the East China Sea was very much in the minds of Japanese Diet members at the time of discussion over the proposed Law on Territorial Sea[16]. Japanese popular sentiment, which still carries deep scars from the two atomic bombs which devastated Hiroshima and Nagasaki during the Second World War, is overwhelmingly against nuclear weapons. The three non-nuclear principles - that Japan will not produce, possess, nor allow into its territory any nuclear weapon, declared by Prime Minister Sato in 1968 - gained solid support from the public. No successive government has dared to suggest any deviation to these principles for fear of being overthrown by popular anger.

The Diet avoided making hard decisions either to risk international disputes by refusing passage of nuclear equipped warships or to propose a new interpretation of the non-nuclear principles that the passage by these ships through the territorial waters does not contradict with the third principle. The compromise, that the breadth of territorial sea was to be temporarily frozen at three miles for the five straits, won support by the majority of the Diet members.

There was, however, a minority party who claimed that mere passage of nuclear equipped warships through territorial waters does not constitute violation of the non-nuclear principle, hence it is not necessary to treat these straits differently. The major opposition party, the Socialist Party, opposed the bill as well because, in its opinion, this arrangement means rejection of the non-nuclear principles and amounts to a renunciation of state sovereignty.[17]

The Non-Nuclear Principle and the Regime of International Straits

Legality of Japan's position not to allow the innocent passage of Nuclear Equipped Warships

The *"designated areas"* approach, that enabled foreign ships to travel on high seas while traversing the five straits, did not eliminate the fundamental question of whether Japan had the right to refuse entry of nuclear equipped warships to its territorial waters. The 1958 Convention provides that any ship has the right of innocent passage through coastal states' territorial sea. However, disputes over the problems of whether warships have the same right of innocent passage or states have the right to require authorisation prior to their passage remains unresolved.[18] Japan's official stance is that it has the right to interpret the innocence of vessels entering its territorial sea: the interpretation is that the passage of nuclear equipped warships is not innocent.[19] Prior notification is required of such vessels and the Japanese government reserves the right to deny entry when it found that the passage is not innocent. The Japanese government took pains to explain that this policy does not mean that the passage of warships in Japanese territorial sea was comprehensively rejected, nor was it subjected to prior authorisation procedure.[20]

Questions were raised on whether the above stance is opposable in the international legal sphere. In his comment on the incident of an ill-fated Soviet submarine's crossing of Japanese territorial sea, Grammig flatly denies its opposability based on the fact that Japan did not enter any reservation to that effect when acceding to the 1958 Convention.[21] The Japanese Government's explanation of the decision not to place reservation was that, in principle, the text of the Convention was a codification of customary law rules, and therefore it was not appropriate for states to enter reservations.[22]

The Japanese Government's understanding of customary norm on the issue is apparent from the following remark. The Soviet Union entered a reservation on article 23 of the 1958 Convention that it *"considers that a coastal state has the right to establish an authorisation procedure for the passage of foreign warships through its territorial waters".*[23] A Japanese government representative commented on it saying: *"while, as a rule, reservation rejects or alters application of certain clauses of a treaty to the concerned party, the [above] reservation does not contradict with the provision of the Convention. Therefore we consider that, technically, it is not a reservation".*[24] This remark shows that the government regarded the international customary norm embodied in the text of the 1958 Convention allows states to demand prior authorisation from warships passing through its territorial sea.

Travaux préparatoires of the 1958 Convention offer an affirmative evidence to Japan's position.

The original draft prepared by the International Law Commission read:

> *"Passage is innocent so long as a ship does not use the territorial sea for* ***committing any acts*** *prejudicial to the security of the coastal State or contrary to the present rules, or to other rules of international law."*[25]

The final text, which reads *"[p]assage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State..."* (Article 14(4)) suggests, by comparison, that it permits coastal states to interpret a ship's innocence on the ground of its features and equipment, not action. Thus, the government's position was generally accepted by leading international law scholars in Japan. The support, however, was not unconditional. They urged the government to strive to prove the credibility of its interpretation of customary norms and let the international community know that it would not consider passage of nuclear equipped warships through its territorial sea as innocent.[26]

The 1982 Law of the Sea Convention and the Regime of International Straits

Article 19 of the United Nations Convention on the Law of the Sea of 1982[27] lists twelve activities that are not innocent. Scholars are divided whether this list is exhaustive or not; in other words, whether a foreign ship should be deemed not innocent only when it engages in one of the activities listed.[28] In any case, the provision undermines Japan's position that the innocence of ships can be determined based on its features, not of its action. Despite the international community's effort to put an end to the debate over rights of states to demand prior authorisation for the passage of warships through territorial waters, the text of the Convention failed to provide any definitive answer. State practice after the adoption of the Convention do not offer any concrete answer either. While some states have entered a statement of interpretation to the effect that authorisation procedure applies to the passage of warships through their territorial waters, others have made declarations condemning such an interpretation as contrary to international law.[29]

In order to accommodate the dispute between coastal states' demand for extended jurisdiction over their adjacent waters and maritime states' insistence on freedom of navigation, the LOS Convention introduces a new concept of *"transit passage"* (Article 38). Under the provision, all ships enjoy the right of undisturbed passage through international straits that are, according to the definition of Article 37 of the Convention, ones *"used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone."* Coastal states' sovereignty and jurisdiction are substantially limited in regard to such straits, leaving them solely under the regime of international law norms.[30] The regime of transit passage implies that Japan will have no good legal argument to maintain its rejection of nuclear equipped warships to enter into its territorial waters, at least in regard to straits that fall within the classification of Article 37. All five straits in question fulfil the criteria.[31]

As noted in the previous paragraphs, the provision of *"designated areas"* in the Law on Territorial Sea was a compromise to avoid fierce dispute on whether to allow nuclear equipped warships to pass through Japanese territorial waters and was intended to be just a temporary arrangement. Ratification of the LOS Convention is regarded as an ideal opportunity to formalise the situation as it requires substantial change to Japan's traditional policy on maritime issues.

The Convention's detailed system of coastal states' jurisdiction and regulation over their adjacent waters requires Japan to divert from its traditional position of skeleton legislation and provide concrete regulation on variety of issues. Suggested areas in need of new legislation or significant revision of existing ones are: criminal and, in particular, drug related prosecution; jurisdiction over maritime structures; measures for prevention of non-innocent intrusion by foreign vessels and so on.[32] If the government failed to take the opportunity and cancel the temporary situation of *"designated areas"*, it will be condemned as being idle and lethargic.

If, on the other hand, the government decides to introduce uniform twelve mile limit for the territorial sea, it faces difficult decision either to establish its claim internationally that no nuclear equipped warships will be allowed into its territorial sea, or to explain to the public that such passage is not contradictory to the non-nuclear principle. The situation is almost identical with that faced by the government two decades ago, except that with the new regime of international

straits, rejecting nuclear warship's passage through these straits is hardly a valid option.[33]

Conclusion

It is ironic that the government facing this difficult situation is headed by the leader of the Socialist Party which opposed most strongly to the *"designated areas"* arrangement in 1977. With overwhelming anti-nuclear sentiment among the Japanese people, even slight alteration to the interpretation of the three non-nuclear principles may expose the fragile government to a risk of collapse, causing yet more turmoil on the domestic political scene. The question is whether the government is prepared to make the tough decision. If not, this issue could cause a delay in Japan's ratification to the LOS Convention.

Yutaka Kawasaki, Faculty of Law, University of Western Australia

1 UNGA Res. 48/263. Cf., UN Doc. A/48/950.

2 Some commentators suggest that the number of domestic laws and regulations that are in need of revision or enactment from scratch will exceed 70. (Interview by the writer with Professor C. Mizukami on 9 January 1995. See also, *Round Table*, 74); *Kaiyo Jihou* [Ocean Report], 30 (1994).

3 Law No. 30 of 2 May 1977. Unofficial translation appears in Yanai and Asomura, 'Japan and the Emerging Order of the Sea', *Japanese Ann. Int'l Law*, 21: 48, 92-99 (1977).

4 In this article, hereafter, the term "mile" refers to nautical mile.

5 Proclamation No. 492 of 28 July 1870, quoted in Mizukami, 'Japan's Territorial Sea Regime' (1) [in Japanese], 16, *Hiroshima Hougaku* 167, 168 (1993) [hereinafter cited as Mizukami (1993-1)].

6 Opened for signature on 29 April 1958. UNTS No. 7477, vol. 516, p. 205. [hereinafter cited as the 1958 Convention] Japan acceded to the Convention on 10 June 1968.

7 The 58th Diet, House of Representatives, Minutes of the Committee on Foreign Affairs, 17 December 1968 at 14-15, cited in Mizukami (1993-1) at 175.

8 E.g., Algeria (independence, 1962; 12-mile territorial sea claim, 1963); Guyana (independence, 1966; 12-mile territorial sea claim, 1977); Malaysia (independence, 1963; 12-mile territorial sea claim, 1969). Cf. R. R. Churchill and A. V. Lowe (1988), *The Law of the Sea* (2nd ed.): 343; United Nations (1991), *Law of the Sea: National Claims to Maritime Jurisdiction,* UN Pub. No. E.91.V.15.

9 Mizukami (1993-1) at 181.

10 Ishihara, 'Advance of Foreign Fishing Boats into Japanese Waters' [in Japanese] in K. Yasufuku *et al* (1983) (eds), *Nihyaku-Kairi Gaisi* [Brief History of 200-Miles] 198, 198, cited in Mizukami (1993-1) at 181.

11 The 76th Diet, House of Representatives, Minutes of Council on Agriculture, Forestry and Fishing, 13 November 1975 at 11-12, quoted in Mizukami (1993-1) at 185-186.

12 *Asahi Shinbun* [newspaper], 3 February 1976 cited in Mizukami (1993-1) at 186.

13 Law Nos. 30 and 31. They are often collectively referred to as the *"two maritime laws"*.

14 This scant formula reflects Japan's traditional understanding of the international law of the sea. While it denounces former assertion that the extent of territorial waters should be governed by international law and not by individual states' arbitrary discretion, it entrusted concrete regulations over its territorial sea entirely to the rules of international law. In the government's opinion, it was not necessary to provide detailed regulations on the regime of territorial sea in this law since it is already provided for by relevant rules of customary international law and its codification, the 1958 Convention. This stance corresponds to the predominant theoretical stance in Japanese legal system concerning the relationship between international law and domestic law, namely, the incorporation of international law rules into its domestic law. According to this theory, rules of international law are directly applicable to the domestic legal system without any transformation. By employing this theory, the government could avoid drafting detailed rules and regulations. Thus the government, not only saved labour and time in drafting, but found it defendable to stick to its assertion that the regime of territorial sea provided in the 1958 Convention represents customary law applicable to all states. (See, for example, S. Yamamoto (1985), *Kokusaihou* [International Law], at 74).

15 They are: Soya Kaikyo between Hokkaido and Sakhalin, Tsugaru Kaikyo between Honshu and Hokkaido, East and West Tsushima Straits between Kyushu and South Korea, and Osumi Kaikyo between Kyushu and Tanegashima.

16 The problem, however, was of minor significance compared to that of the presence of American Pacific fleet using Japanese ports as its base. Time and again, questions are raised if the warships calling at Japanese ports are armed with nuclear weapons. The government's official explanation is that since the United States agreed to *"consult"* with Japan prior to the entry of vessels carrying nuclear weapons, and since there has never been any such consultation,

they assume there is no nuclear weap[illegible] on these ships. (C.f., Exchange of Notes Con[illegible]ning the Implementation of Article 6 of the Treaty of Mutual Co-operation and Security Between Japan and the United States of America, signed 19 January 1960). See also, for example, Onuma (1993), Japan's "Peace Constitution" and Collective Security (1) and (2) [in Japanese], *Kokusaihou Gaiko Zasshi* [The Journal of International Law and Diplomacy], 92: Nos. 1 and 2, 1.

17 Nakamura (1979), 'The Twelve Mile Territorial Sea and the Freeze of Three Mile Limits in the International Straits,' [in Japanese], *Jurisuto* [Jurist], 647: 29. See also, Mizukami (1993-1) at 190.

18 The (First) United Nations Conference on the Law of the Sea failed to reach an agreement over this issue. As a consequence, no provision was included in the 1958 Convention. (C.f., Corfu Channel Case, [1949] ICJ Rep. 1). See also, for example, R. R. Churchill and A. V. Lowe, *supra*, note 8, at 74; R. Hatano and Y. Ogawa (1982) (eds) *Kokusaihou Kougi* [Lectures on International Law] 161.
The rejection by the Conference of the draft article providing right of states to demand prior authorisation led some scholars to assert that states cannot claim such right. See, Nakamura (1982), 'The Passage Through the Territorial Sea of Foreign Warships Carrying Nuclear Weapons', *Japanese Ann. Int'l. Law*, 25: 1, 6-7; Grammig (1980), 'The Yoron Jima Submarine Incident of August 1980: A Soviet Violation of the Law of the Sea', *Harv. Int'l. L.J.*, 22: 331, 334-336.

19 Statement by the Minister of Foreign Affairs, The 58th Diet, House of Representatives, Minutes of the Council of Foreign Affairs, 17 April 1978, 13 cited in S. Yamamoto, *supra* note 14, at 324.

20 S. Oda and H. Owada (1980) (eds), *The Practice of Japan in International Law* 1961 -1970, 144-145.

21 Grammig, *supra* note 18, at 336-338.

22 The 58th Diet, House of Representatives, Minutes of the Council of Foreign Affairs, 15 March 1978, 16, quoted in Mizukami (1993), 'Japan's Territorial Sea regime (2)' [in Japanese] *Hiroshima Hougaku*, 17: 219, 246 [hereinafter cited as Mizukami (1993-2)]. Cf., note 14 *supra*.

23 W. Butler (1967), *The Law of Soviet Territorial Waters*, 140.

24 The 58th Diet, House of Representatives, Minutes of the Council of Foreign Affairs, 17 April 1978, 13 quoted in, Mizukami (1993-2) at 246-247.

25 [1956] 2 Yearbook of the International Law Commission 272 [emphasis added].

26 See, for example, S. Yamamoto, *supra* note 14, at 324.

27 Adopted on 30 April 1982, reprinted in, United Nations, The Law of the Sea: Official Text of the United Nations on the Law of the Sea with Annexes and Index, UN Pub. Sales No. E.83.V.5 (1983) [hereinafter cited as the LOS Convention].

28 Nakamura, *supra* note 18 at 6, and Grammig, *supra* note 18 at 351, claim that the list is exhaustive. R. R. Churchill and A. V. Lowe, *supra* note 8 at 72, oppose.

29 Cf., Statements by Cape Verde, Finland and Sweden, Iran, and Oman, United Nations, The Law of the Sea: Status of the United Nations Convention on the Law of the Sea 12-26, UN Pub. Sales No. E.85.V.5 (1985); *Contra*, Statements by Germany, the United States and France, UN Doc. A/CONF.62/WS/37. See also, S. Yamamoto, *supra* note 14, at 323.

30 Moore (1980), 'The Regime of Straits', *Am. J. Int'l Law*, 74: 104, 104-106.

31 *See*, The Times Atlas and Encyclopaedia of the Sea (1989),150-151.

32 *Round Table, supra* note 2, at 40.

33 To further complicate the matter, the Republic of Korea, which faces Japanese shore across the West Tsushima strait, took a similar approach when establishing their territorial sea in 1977. Introducing 12 mile limit to that strait will almost inevitably cause Korean government to abolish special treatment over the area as well. This will give rise to a series of issues such as demarcation of maritime borders and possible co-management scheme between the two governments. See, C. Y. Pak (1988), *The Korean Strait*, 75: Mizukami (1993-2) at 228.