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論 説

Contribution by the Commission on the Limits of the Continental Shelf to the International Legal Order of the Oceans⁽¹⁾

Atsuko KANEHARA

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1. Introduction

The purpose of this paper is to make a brief examination of the function of the Commission on the Limits of the Continental Shelf (CLCS) to secure and realize the legal regime of the outer continental shelf (OCS)⁽²⁾ under the United

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- (1) This paper is based upon the presentation which this author made in the 4th International Symposium on the Law of the Sea on the 14th of December, 2017, in Tokyo, hosted by Ministry of Foreign Affairs of Japan, United Nations University Institute for the Advanced Study of Sustainability, and National Ocean Policy Secretariat, Cabinet Office of Japan.
 - (2) The term “regime” is used here as a general expression to indicate all the relevant provisions as a total relating to the outer continental shelf under the United Nations Convention on the Law of the Sea. It does not connote in any sense a particular legal effect by the reason that all the provisions regarding the outer continental shelf form a “regime.” Later in this paper, whether it is necessary to grasp all those provisions as constructing a regime or a *sui generis* regime so as to have special

Nations Convention on the Law of the Sea (UNCLOS) and arguably customary international law⁽³⁾.

A new situation is emerging that strongly requires consideration or re-consideration of the potentialities of and the limitation on the function of CLCS. In this regard, two points deserve attention.

First, CLCS's activities are increasing world-wide⁽⁴⁾. It has already received 78 submissions from coastal States as of 26 October 2017⁽⁵⁾. In addition, both party States and non-party States to UNCLOS have been involved in the CLCS procedures by submitting observations in various ways relating to submissions from coastal States⁽⁶⁾. Thus, for both party States and non-party States to UNCLOS, there might be an expectation that it really globally fulfills the function to maintain the international legal order of the oceans in relation to

legal effects will be discussed.

- (3) Regarding the inner continental shelf, both treaty rules and customary international law have been developed. For instance, in the North Sea Continental Shelf Case, International Court of Justice declared that Article 1 to Article 3 of the 1958 Convention on the Continental Shelf had become customary international law rules. North Sea Continental Shelf Case (Federal Republic of Germany/ Denmark; Federal Republic of Germany/ Netherlands), Judgment of 20 February 1969, *ICJ Reports 1969*, para. 63. As will be discussed later, concerning OCS, whether the relevant provisions of UNCLOS have obtained a status of customary international law requires a careful consideration. This issue relates to that of whether all the relevant provisions under UNCLOS form a legal regime so as to special legal effects. Also the development of customary international law may be different between the inner- and outer- CS.
- (4) Concerning the recent workload of CLCS and possible problems that it may face, P. M. Vernet, "The Work of the Commission on the Limits of the Continental Shelf: Current Accomplishments and Challenges on the Verge of Its 20th Anniversary," 20 *Max Planck Yearbook of United Nations Law- Online*, p. 36 *et seq.*
- (5) [Http://www.un.org/Depts/los/clcs_new/commission_submissions.htm](http://www.un.org/Depts/los/clcs_new/commission_submissions.htm). All the URLs cited in this paper were last accessed on the 14th of December, 2017. One State may submit information to OCS multiple times, when, for instance, it does so both individually by itself and jointly with other State(s). Therefore, the number 78 does not mean that of States which have submitted the information to OCS.
- (6) The clear legal basis of observations from party States and non-party States to UNCLOS is not explicitly provided for by UNCLOS and other legal documents relating to CLCS. This point will be discussed later.

OCS⁽⁷⁾.

Second, particularly in the jurisprudence of international courts and arbitral tribunals the function of CLCS has been discussed and defined. The International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS) and arbitral tribunals have entertained disputes concerning the delimitation of OCS. For instance, some issues that have been argued: the delimitation and delineation of OCS are distinguished from each other⁽⁸⁾; the

(7) “The international legal order of the oceans” means both treaties and customary international law with interaction of among principles and rules of them that regulate uses and protection of the oceans. A possible CLCS function will be argued which is beyond the function that is presupposed solely under the framework of UNCLOS. Such potential function as well as the function under UNCLOS of CLCS would contribute to the development of the international legal order of the oceans.

(8) The distinction between the delineation and delimitation of OCS was typically declared by the judgment rendered by ITLOS on the Bay of Bengal Case in the context of distinguishing the function of CLCS and dispute settlement procedures. It reads:

There is clear distinction between the delimitation of the continental shelf under article 83 and the delineation of its outer limits under article 76. Under the latter article, the Commission (CLCS, by the author) is assigned the function of making recommendations to coastal States on matters relating to the establishment of the outer limits of the continental shelf, but it does so without prejudice to delimitation of maritime boundaries. The function of settling disputes with respect to delimitation of maritime boundaries is entrusted to dispute settlement procedures under article 83 and Part XV of the Convention (UNCLOS, by the author), which include international courts and tribunals.

Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal, at para. 376,

https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/published/C16_Judgment.pdf. Hereinafter this case will be referred to as the Bay of Bengal Case. In a recent case, ICJ adopted the same position as that of ITLOS. Although ICJ pointed out the unique situation of the Bay of Bengal, it confirmed the judgment of ITLOS on the Bay of Bengal Case. Territorial and Maritime Dispute (Nicaragua v. Columbia), Judgment of 19 November 2012, <http://www.icj-cij.org/files/case-related/124/124-20121119-JUD-01-00-EN.pdf>, para. 125. Hereinafter this case will be referred to as the 2012 Nicaragua v. Colombia Case. Later ICJ also clearly adopted the same position as that of ITLOS. Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia), Preliminary Objections, Judgment of 17 March 2016, <http://www.icj-cij.org/files/case-related/154/154-20160317-JUD-01-00-EN.pdf>, para. 112. Hereinafter this case will be referred

determination of the entitlement to OCS is separate from delimitation of it⁽⁹⁾; “the establishment of limits of OCS and its delimitation” have an impact upon each other⁽¹⁰⁾; the function of CLCS in the delineation process of OCS is different from the delimitation process; there are complementary functions between CLCS and judicial or arbitral bodies⁽¹¹⁾; and the expectation on CLCS is to realize the object and purpose of UNCLOS⁽¹²⁾.

to as the 2016 Nicaragua v. Colombia Case.

(9) It is interesting that in the 2016 Nicaragua v. Colombia Case, Colombia maintains that “in the present case, Nicaragua ‘requests a continental shelf delimitation between opposite coasts,’ which cannot be done without first identifying the extent, or limit, of each State’s shelf entitlement”. According to this position, the relationship between the issue of the entitlement to OCS and delineation, on the one hand, and the issue of the delimitation of OCS, on the other hand, would depend on whether the coasts of the party States to the delimitation dispute are adjacent or opposite, *ibid.*, para. 100.

(10) *Ibid.*, para. 113. In this phrase, the meaning of “impact upon” is not clear. Regarding the inner continental shelf, ICJ said that the issues of entitlement and delimitation are complementary. ICJ itself explained the meaning of “complementarity.” The judgment reads:

That the questions of entitlement and of definition of continental shelf, on the one hand, and of delimitation of continental shelf on the other, are not only distinct but are also complementary is self-evident. The legal basis of that which is to be delimited, and of entitlement to it, cannot be other than pertinent to that delimitation.

Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/ Malta), Judgment of 3 June 1985, *ICJ Report 1985*, para. 27. Hereinafter this case will be referred to as the Libya/ Malta Case.

(11) As for the complementary functions of CLCS and ITLOS, see the judgment of ITLOS in the Bay of Bengal Case, *op. cit.*, *supra* n. 8, para. 373. CLCS has the function of the delineation of OCS and judicial bodies and tribunals fulfill the function of dispute settlement in cases of delimitation disputes regarding overlapping OCS.

(12) This point was demonstrated by ITLOS in the Bay of Bengal Case. After explaining that the existence of a delimitation dispute prevents CLCS from its function to consider submissions from coastal States (ITLOS expressed this situation as an “impasse”), it maintained that it would be contrary to the object and purpose of UNCLOS not to resolve the existing impasse. According to ITLOS, non-exercise of its jurisdiction over the dispute concerned would not only fail to resolve a long standing dispute, but also would not be conducive to the efficient operation of UNCLOS. *Op. cit.*, *supra* n. 8, paras. 391–392. The same reasoning was confirmed by ICJ in the 2016 Nicaragua v. Colombia Case, *op. cit.*, *supra* n. 8, para. 104. In a different context ICJ declared the obligation of a party State to UNCLOS (Nicaragua) in relation to a non-party State (Colombia) to submit information regarding its OCS. It reads:

The court recalls that UNCLOS, according to its Preamble, is intended to establish “a legal

Under these circumstances, from the perspective of international law, mainly UNCLOS, it is indispensable to determine precisely and correctly the potentialities of and the limitation on the function of CLCS.

The perspective of this paper in examining the function of CLCS is to secure the validity of international law over OCS. In order to achieve the goal to maintain the legal order on the continental shelf (CS) and OCS, international law has continuously kept its validity over the rights both to CS and OCS. It has built a legal regime particularly of OCS which will be further explained later. The main pillar of international law over CS and OCS is the validity of international law over the entitlement both to CS and OCS. International law has encompassed the entitlement both to CS and to OCS within its legal order. By being based upon this, it may safely establish the international legal order of the oceans with respect to CS and OCS.

Therefore, the examination of the issue will come first regarding the basis of

order for the seas and oceans which will facilitate international communication, and will promote the peaceful use of the seas and oceans, the equitable and efficient utilization of their resources.” The Preamble also stresses that “the problems of ocean space are closely interrelated and need to be considered as a whole.” Given the object and purpose of UNCLOS, as stipulated in its Preamble, the fact that Colombia is not a party thereto does not relieve Nicaragua of its obligations under Article 76 of that Convention.

The 2012 Nicaragua v. Colombia Case, *op. cit.*, *supra* n. 8, para. 120. Before this remark, the court cited the following part of the judgment in the case concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea.

[A]ny claim of continental shelf rights beyond 200 miles ... must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder.

The Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras),

<http://www.icj-cij.org/files/case-related/120/120-20071008-JUD-01-00-EN.pdf>, para. 319.

The reasoning given by the court touches the object and purpose of UNCLOS that should be realized by the function of OCS. The international legal order of the oceans and the possible function of CLCS to realize the international legal order relating to OCS are inspired for this author by these remarks. See, *supra* note 7.

the entitlement to OCS (Section 2). Particular focus will be placed upon the relationship between the entitlement to OCS and the function of CLCS⁽¹³⁾. Then, in Section 3, based upon the tentative conclusion that will be derived in Section 2, as potentialities of CLCS, a possible enlargement of the function of CLCS will be proposed with some legal justification therefor. Contrary to this, the possible limitation on the function of CLCS will follow (Section 4). At the end, some concluding remarks will be given (Section 5).

In the following analysis, while this paper is dealing with OCS, the arguments concerning CS will be also considered, as far as it is not inappropriate to do so⁽¹⁴⁾.

2. Entitlement to OCS

(1) Focus of the Analysis

The discussion of the entitlement to OCS has critical importance to examine the function of CLCS⁽¹⁵⁾. This is because the way to place the entitlement to OCS in a legal order brings various theoretical ramifications. In order to depict

(13) Generally concerning the issue of the inherency of the entitlement to OCS, A. Kanehara, “200 Kairi wo Koeru Tairikudana no Genkai wo Meguru Itikosatsu (Some Considerations Concerning the Limitation of the Outer Continental Shelf,” Murase and Eto eds., *Kaiyo Kyokai Kakutei no Kokusaiho (International Law of Maritime Delimitation)*, Toshindo, 2008, pp. 109–116.

(14) There is an opinion that under UNCLOS, CS and OCS form a single regime. Concerning such an opinion, see, *infra*. 71. If it is the case, it is adequate to apply arguments relating to CS to OCS, too. However, such an opinion is not enough substantiated. Therefore, depending on the issues to be dealt with, it is necessary to determine whether it is appropriate to apply the arguments regarding CS also to OCS.

(15) There is a different issue from that of the entitlement to CS and OCS. It is an issue of the nature of rights of a coastal State to CS and OCS. As an examination of the issue, J. — H. Paik, “A Single Maritime Boundary for the Continental Shelf and the EEZ,” *17 Korean Journal of Comparative Law*, 1989, pp. 41–43.

those ramifications, it is useful to recognize various arguments that are closely related to this issue ⁽¹⁶⁾. They are divided into the following two categories.

First, concerning the entitlement to OCS, it may have its ground in UNCLOS/ customary international law/ a famous principle, “the land dominates the sea” the legal status of which is not perfectly clear ⁽¹⁷⁾ ⁽¹⁸⁾. If this principle is a maxim that is too fundamental to decide its legal source, such as treaties and customary international law, it is possible that the entitlement to OCS is maintained beyond UNCLOS and even beyond customary international law. This means that the entitlement to OCS is excluded from the regulation by international law ⁽¹⁹⁾. An issue would be provoked regarding the validity of international law over the entitlement to OCS. There may be a difference between the entitlement to CS and that to OCS, at least if the bases of the

(16) It is not possible for this paper to thoroughly consider all the following issues. However, by confirming the theoretical ramifications derived from certain understanding of the issue of the entitlement to OCS, it is possible to express the theoretical coverage of this paper.

(17) In the Fisheries Case, ICJ stated that:

It is the land which confers upon the coastal State a right to the waters off its coast. Fisheries Case (United Kingdom v. Norway), Judgment of December 18th 1951, *ICJ Reports 1951*, p.133. Hereinafter this case will be referred to as the Fishery Case. As to the referral to the principle “the land dominates the sea,” see, the judgment of the North Sea Continental Shelf Case, *op. cit.*, *supra* n. 3, para. 96, and as a similar remark, para. 40. See also, the judgment rendered by ITLOS on the Bay of Bengal Case, *op. cit.*, *supra* n. 8, para. 409. ICJ also mentioned the principle “the land dominates the sea” in the 2012 Nicaragua v. Colombia Case, *op. cit.*, *supra* n. 8, para. 139.

(18) In the cases regarding the delimitation of CS, the principle “the land dominates the sea” is mentioned in the context of the determination of the relevant coasts of party States. For instance, L’affaire de Délimitation Maritime en Mer Noire (Roumanie c. Ukraine), Arrêt du 3 Février 2009, <http://www.icj-cij.org/files/case-related/132/132-20090203-JUD-01-00-EN.pdf>, para. 77; the 2012 Nicaragua v. Colombia Case, *op. cit.*, *supra* n. 8, para. 140;

(19) In asking whether CLCS fulfills some function for international law to keep the entitlement to OCS within its legal order, the issue of the relation between the entitlement to OCS and the function of OCS exists among the issues with respect to the validity of international law over the entitlement to OCS. This author has succinctly analyzed this issue. A. Kanehara, “Validity of International Law over Historic Rights: The Arbitral Awards (merits) on the South China Sea Dispute,” 61 *Sophia Law Review*, 2017, p. 27 *et seq.* See particularly, pp. 66–69.

entitlement to the inner and outer continental shelf are sought under UNCLOS, Article 76. According to Article 76, Paragraph 1, the entitlement to CS is based upon distance from coasts, and the entitlement to OCS is based upon natural prolongation from coasts⁽²⁰⁾.

Second, as a further theoretical reach of the issue of the entitlement to OCS, with respect to the relationship between the entitlement to OCS and delimitation of OCS, it has been repeatedly confirmed that the delineation and delimitation of OCS are distinguished from each other, and that the function of CLCS regarding the delineation of OCS and the dispute settlement function of international courts and tribunals regarding delimitation disputes can complementarily coexist⁽²¹⁾. While the relation between the entitlement to OCS and the

(20) If the entitlement to the inner and outer continental shelf is sought beyond UNCLOS and under the principle “the land dominates the sea”, the entitlement is the same in both the inner and outer continental shelf.

(21) Here also comes the issue of the relationship between science and law in dealing with the delineation and delimitation of OCS. CLCS consists of scientists and it does not have as its members lawyers and legal experts. In this regard, some concern is voiced by authorities. For instance, see, L. D. M. Nelson, “The Continental Shelf: Interplay of Law and Science,” N. Ando *et al* eds., *Liber Amicorum Judge Oda*, Vol. 2, Kluwer, 2002, p. 1237. Both the delineation and delimitation of OCS require scientific knowledge and legal interpretation of the relevant provision of international law. In the Bay of Bengal Case ITLOS took a significant stance on the relationship between science and law deciding the delimitation issue apart from the delineation issue. Concerning the interpretation of Article 76 of UNCLOS, ITLOS maintains that its proper interpretation and application require both legal and scientific expertise. It reads:

The Tribunal’s consideration of whether it is appropriate to interpret article 76 of the Convention (UNCLOS, by the author) requires careful examination of the nature of the questions posed in this case and the functions of the Commission (CLCS, by the author) established by that article. It takes note in this regard that, as this article contains elements of law and science, its proper interpretation and application require both legal and scientific expertise. While the Commission is a scientific and technical body with recommendatory functions entrusted by the Convention to consider scientific and technical issues arising in the implementation of article 76 on the basis of submissions by coastal States, the Tribunal can interpret and apply the provisions of the Convention, including article 76. This may include dealing with uncontested scientific materials or require recourse to experts.

Op. cit., *supra* n. 8, para. 411. Further, ITLOS underlines that:

function of CLCS has been discussed both in the jurisprudence and in authorities, there seems to be a different understanding with respect to this issue. In addition, there is an issue of possible submission by non-party States to UNCLOS to CLCS when they are establishing the outer limits of their OCS. The issue of a legal or even extra-legal basis of the entitlement to OCS of non-party States to UNCLOS has inseparable relation to the function of CLCS.

Bearing well in mind these various issues, the issue of the function of CLCS in relation to the entitlement to OCS will be focused on as the main pillar of this paper. In the following part of this Section, the issues mainly belonging to the first category above will be dealt with.

(2) “Inherent” Nature of the Entitlement to OCS

① Regarding the basis of the “inherency” of the entitlement to OCS, Article 77,

As the question of the Parties’ entitlement to a continental shelf beyond 200 nm raises issues that are, the Tribunal (ITLOS, by the author) can and should determine entitlements of the Parties in this particular case.

Ibid., para. 413. After it maintains that the requirement of natural prolongation is determined by the outer edge of OCS in accordance with Article 76, Paragraph 4, it says that:

[The tribunal] would have been hesitant to proceed with the delimitation of the area beyond 200 nm had it concluded that there was significant uncertainty as to the existence of a continental margin in the area in question.

Ibid., para. 443. The delimitation by ITLOS presupposes an area of overlapping entitlements, *ibid.*, para. 397. To ascertain the overlap, ITLOS set forth the “significant uncertainty” standard. ITOLOS having “uncontested scientific materials (*ibid.*, para. 411)”, found that there was no such significant uncertainty. According to this standard, substantially ITLOS made a distribution of function between CLCS and itself. Treves discussed law and science in the international courts in general, “Law and Science in the Interpretation of the Law of the Sea Convention- Article 76 between the Law of the Sea Tribunal and the Commission on the Limits of the Continental Shelf,” 3-3 *Journal of International Dispute Settlement*, 2012, pp. 488-491. As a positive characteristic of CLCS, its capacity is to interpret Article 76 while making a distinction between legal terms and scientific terms. See, A. G. Elferink, “The Continental Shelf beyond 200 Nautical Miles: The Relationship between the CLCS and Third Party Dispute Settlement,” A. G. Oude Elferink and D. R. Rothwell eds., *Ocean Management in the 21st Century: Institutional Frameworks and Responses*, Martinus Nijhoff Publisher, 2004, p. 109.

Paragraph 3 is the most often mentioned provision under UNCLOS. It is the same as Article 2 Paragraph 3, of the Convention on the Continental Shelf (CCS). Although it might be arguable⁽²²⁾ that the entitlement to OCS consists of natural prolongation from the land, the point has been repeatedly confirmed by the jurisprudence that the right over the land confers the right to OCS⁽²³⁾. This is also the case with the issue of the entitlement to CS⁽²⁴⁾. In recent cases, the maxim or the same connotation are given in the context of the determination of relevant coasts for the delimitation of CS⁽²⁵⁾.

② There are two possibilities for the entitlement to OCS to exist in an extra-legal order. First, it can be argued that the maxim “the land dominates the sea” is an extra-legal principle or maxim. In this regard, the famous expression⁽²⁶⁾ given by ICJ in the North Sea Continental Shelf Case would provide a ground, such as the rights to CS *ab initio* and *ipso facto* belonging to coastal States. Second, natural prolongation is not a legal term but a scientific one so as to be determined by scientific considerations.

(22) ITLOS denied that natural prolongation is an independent basis of the entitlement to OCS. It maintained that natural prolongation should be understood with the concept of continental margin. The Bay of Bengal Case, *op. cit., supra* n. 8, para. 437. In this regard, ITLOS took a different position from that of ICJ which declared Article 76, Paragraph 1 as a customary rule separate from other provisions of the article. The 2012 Nicaragua v. Colombia Case, *op. cit., supra* n. 8, para. 118.

(23) For instance, as a discussion of OCS, after ICJ confirmed that the basis of OCS is natural prolongation and the *ab initio* and *ipso facto* nature of the rights of coastal States to OCS, it declared the customary law status of Article 76, Paragraph 1. The 2012 Nicaragua v. Colombia Case, *op. cit., supra* n. 8, paras. 111, 115–118. ITLOS more clearly declared that the entitlement to CS exists by the sole fact that the basis of entitlement, namely, sovereignty over the land territory, is present. This remark was given in examining the entitlement to OCS, and therefore, “the entitlement to CS” means the entitlement both to CS and OCS.

(24) Beyond the issue of the entitlement to CS and OCS, the maxim “the land dominates the sea” has been established as one of the most fundamental principles of the law of the sea. As early as in 1951, ICJ in the Fisheries Case made a remark with the same meaning as the maxim. *Supra*, n. 17.

(25) For instance, see, *supra* n. 18.

(26) *Op. cit., supra* n. 3, para. 19.

Concerning the first type of argument, it is difficult to find a clear expression of the legal status of the maxim “the land dominates the sea.” It may be a customary international law principle. In this regard, ICJ declared in the North Sea Continental Shelf Case the customary international law status of Article 1 to Article 3 of the Convention on the Continental Shelf⁽²⁷⁾. These articles provide for the sovereign right to CS and its inherency. Accordingly, the declaration by ICJ of the customary international law status of these articles at least implicitly means that the entitlement to CS has its basis within international law. Although in the same case, ICJ gave the famous expression relating to the rights to CS “*ab initio* and *ipso facto*”⁽²⁸⁾, it also mentioned a “legal regime” of CS⁽²⁹⁾. It also made an expression that a coastal State has *ipso jure* the rights to CS⁽³⁰⁾.

Considering the fact that these remarks were given in relation to CS, there might be a difference in the basis of the entitlement to OCS. However, ICJ in the 2012 Nicaragua v. Colombia Case declared that Article 76, Paragraph 1 is customary international law⁽³¹⁾. As far as the provision prescribes the entitlement to OCS, natural prolongation⁽³²⁾, with respect to OCS, too, the entitlement to OCS has its basis within international law⁽³³⁾. If this is correct, it

(27) Article 1 and Article 2 of the Convention provide for the definition of CS and a sovereign right of a coastal State. Article 3 confirms the legal status of the superjacent waters of CS as the high seas.

(28) This expression is addressed to the entitlement to CS. A. G. Oude Elferink, “Article 76 of the LOSC on the Definition of the Continental Shelf: Questions concerning its Interpretation from a Legal Perspective,” 21 *The International Journal of Marine and Coastal Law*, 2006, p. 273, footnote 18. Therefore, even if this expression connotes an extra-legal nature of the entitlement to CS, it is not necessarily the case with OCS.

(29) *Op. cit.*, *supra* n. 3, para. 95.

(30) *Ibid.*, para. 43. D. P. O’Connell, edited by I. A. Shearer, *The International Law of the Sea*, Vol. I, Clarendon Press, 1982, P. 483.

(31) *Op. cit.*, *supra* n. 8, para. 118.

(32) In this regard, concerning the different position taken by ITLOS in the Bay of Bengal Case, see, *supra* n. 8, para. 437.

(33) Further examination is needed of this point. It will be touched upon in this paper in discussing

is not necessary to further discuss the legal status of the maxim “the land dominates the sea”⁽³⁴⁾.

With respect to the second argument, namely the argument for the scientific nature of the concept of natural prolongation⁽³⁵⁾, on several occasions the jurisprudence maintained that the concept is a legal one⁽³⁶⁾. These cases are regarding CS not OCS. However, the concept of natural prolongation should be

the possible entitlement to OCS of non-party States to UNCLOS in Section 3.

- (34) McDorman indicates the inherent rights of coastal States under customary law is broader than those under UNCLOS. He states that:

A question raised and answered below is whether a State by being a party to the LOSC (UNCLOS, by the author), has agreed to limits on its inherent right to a shelf. The answer is yes, but only a limited manner.

T. L. McDorman, “The Continental Shelf,” D. R. Rothwell *et al eds.*, *The Oxford Handbook of the Law of the Sea*, Oxford University Press, 2015, p. 185.

- (35) As a general examination of the concept of natural prolongation and of the relation of science and law in the concept of CS, H. J. Kim, “The Natural Prolongation: A Living Myth in the Regime of the Continental Shelf,” *45 Ocean Development & International Law*, 2014, p. 374 *et seq.* Charney points out that natural prolongation, or geological and geomorphological factors have not been considered by courts and tribunals in maritime delimitation cases. J. I. Charney, “International Maritime Boundaries for the Continental Shelf: The Relevance of Natural Prolongation,” N. Ando *et al eds.*, *Liber Amicorum Judge Oda*, Vol. 2, Kluwer, 2002. 1011 *et seq.*

- (36) A typical example is the remark given by the arbitral tribunal in the Case Concerning the Delimitation of Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic. It reads:

In International Law... the concept of the continental shelf is a juridical concept which connotes the natural prolongation under the sea...[T]he fact that in international law the continental shelf is a juridical concept means that its scope and the conditions for its application are not determined exclusively by the physical facts of geology but also by legal rules.

Award of 30 June 1977, XVIII *Reports of International Arbitral Awards*, para. 191. As similar remarks, ICJ said that:

[N]atural prolongation ... in spite of its physical origins has throughout its history become more and more a complex and juridical concept.

The Libya/ Malta Case, *op. cit.*, *supra* n. 10, para. 35. A thorough examination of the entitlement to CS, D. N. Hutchinson, “The Seaward Limit to Continental Shelf Jurisdiction in Customary International Law,” 56 *The British Year Book of International Law*, 1985, p. 111 *et seq.*

the same for both CS and OCS. Therefore, by the development of the jurisprudence, it can be said that international law has encompassed the entitlement both to CS and OCS within its legal order.

In addition, particularly with respect to OCS, ITLOS in the Bay of Bengal Case kept the legal nature of the entitlement to OCS ⁽³⁷⁾. It underlies that:

As the question of the Parties' entitlement to a continental shelf beyond 200 nm raises issues that are *predominantly legal in nature*, the Tribunal (ITLOS, by the author) can and should determine entitlements of the Parties in this particular case (emphasis added) ⁽³⁸⁾.

Nonetheless, it admits that both science and law are required to decide the entitlement to OCS ⁽³⁹⁾. It formulated the "significant uncertainty" test ⁽⁴⁰⁾. If there is not significant uncertainty on the entitlement to OCS, ITLOS, as a judicial organ, may legally decide the entitlement to OCS so as to proceed to the delimitation of OCS ⁽⁴¹⁾.

In this case, ITLOS denied that natural prolongation is an independent basis of the entitlement to OCS ⁽⁴²⁾. It pointed out that the interpretation of natural

(37) In this regard, some authorities point out the difficulty that ITLOS faces in determining the entitlement to OCS and overlapping of OCS. R. Churchill, "The Bangladesh/ Myanmar Case: Continuity and Novelty in the Law of Maritime Boundary Delimitation," 1 *Cambridge Journal of International and Comparative Law*, 2012, p. 150; M. Lando, "Delimiting the Continental Shelf beyond 200 Nautical Miles at the International Court of Justice: The Nicaragua v. Colombia Cases," 16 *Chinese Journal of International Law*, 2017, para. 36; D. Roughton and C. Trehearne, "The Continental Shelf," in D. J. Attard (General Editor) *et al* eds., *The IMLI Manual on International Maritime Law*, Oxford University Press, 2014, p. 171.

(38) The Bay of Bengal Case, *op. cit.*, *supra* n. 8, para. 413.

(39) Concerning the relation between science and law, for instance, Treves, *op. cit.*, *supra* n. 21.

(40) *Supra* n. 21.

(41) After it confirmed the overlapping of OCS between the two parties without significant uncertainty, ITLOS delimited it.

(42) Bangladesh maintained that the area claimed by Myanmar does not constitute a natural prolongation of its territory. ITLOS refused this position. The tribunal thought that the outer edge of the continental margin is an essential element in determining the extent of CS. The Bay of Bengal Case, *op. cit.*, *supra* n. 8, paras. 432-434. In the following arbitral case, Bangladesh

prolongation should be in connection with other paragraphs of the article ⁽⁴³⁾. Other paragraphs, particularly Paragraphs 3 to 7 of Article 76, contain scientific concepts that are closely related to the concept of natural prolongation. It is necessary for coastal States to apply these paragraphs in order to delineate its OCS. Therefore, the position taken by ITLOS may reflect that science has critical importance in determining the entitlement to OCS. In that sense, ITLOS sought a balance between law and science in determining the entitlement to OCS by applying the “significant uncertainty” test ⁽⁴⁴⁾. Such an interpretation of Article 76 that does not allow separating solely Paragraph 1 of Article 76 from other paragraphs is really significant in discussing a possible “legal regime of OCS” under UNCLOS. This will be dealt with later in Section 4.

(3) Legal Effects to be Derived from the “Inherency” in the Entitlement to OCS

① Concerning the legal effects to be derived from the inherency in the entitlement to OCS, there are various positions, including an argument with

withdrew such an argument. Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India (Bangladesh v. India), Award of 7 July, 2014, <https://www.pcacases.com/web/sendAttach/383>, para. 439.

(43) *Supra* n. 32.

(44) Concerning the test, see, *supra* n. 21. It is pointed out that even if the test of proof for the entitlement to OCS is the same both for a judicial organ, such as ITLOS, and for a scientific organ, such as CLCS, the decisions by the two organs are not necessarily the same. In that case, there would be a conflict between the two organs, and the complementarity between them that is declared by ITLOS would lose its justification. Lando, *op. cit.*, *supra* n. 37, para. 37. In line with this argument, the author expresses doubt about the prior decisions by judicial organs of the entitlement to and the delimitation of OCS, which means that the recommendations of CLCS should come first. *Ibid.*, para. 38. For a different reason, Judge Kunoy also denied a prior decision by ITLOS of the overlapping and delimitation of OCS. B. Kunoy, “The Admissibility of a Plea to an International Adjudicative Forum to Delimit the Outer Continental Shelf Prior to the Adoption of Final Recommendations by the Commission on the Limits of the Continental Shelf,” 25 *The International Journal of Marine and Coastal Law*, 2010, pp. 248, 266.

respect to the entitlement to CS. A mild position explains as follows: the inherency of the entitlement to CS means denial of prescriptive rights due to prior claims over and prior activities on CS ⁽⁴⁵⁾. A stronger position argues that the entitlement to CS and OCS exists without getting through any legal procedures ⁽⁴⁶⁾.

From the perspective of the function of CLCS, the latter position needs to be further considered ⁽⁴⁷⁾.

② The point to be confirmed above all is that even the stronger position with respect to the inherency to the entitlement to OCS denies the extra-legal nature of the entitlement to OCS. The authors who take this position admit that the entitlement to OCS is a legal one ⁽⁴⁸⁾. The core argument of these authors exists in the point that the entitlement to OCS would not be affected in any way by

(45) O'Connell, *op. cit.*, *supra* n. 30, p. 482; A. Gioia, "Tunisia's Claims over Adjacent Seas and the Doctrine of 'Historic Rights,'" 11 *Syracuse Journal of International Law*, 1984, pp. 371-372; Kanehara, *op. cit.*, *supra* n. 19, pp. 66-67; Kanehara, *op. cit.*, *supra* n. 13, pp. 109-116.

(46) McDorman emphasizes that the rights of a coastal State to OCS exist "*ipso facto*" and "*ab initio*" as being declared by ICJ in the North Sea Continental Shelf Case. T. L. McDorman, "The International Legal Framework and the States Activities Regarding the Continental Shelf beyond 200-n. Miles in and adjacent to East and South China Sea," in J. M. Van Dyke et al. eds., *Governing Ocean Resources — New Challenges and Emerging Regimes, A Tribute to Judge Choon-Ho Park*, Martinus Nijhoff Publishers, 2013, p. 169. Nevertheless, he cited an opinion that a coastal State's "inherent" right to CS under Article 77, Paragraph 3 of UNCLOS does not remove from the coastal State the burden of demonstrating its entitlement. T. L. McDorman, "The Outer Continental Shelf in the Arctic Ocean: Legal Framework and Recent Developments," in D. Vidas ed., *Law, Technology and Science for Oceans in Globalization — IUU Fishing, Oil Pollution, Bioprospecting, Outer Continental Shelf*, Martinus Nijhoff Publishers, 2010, pp. 504-506. A similar position is taken by Kunoy, *op. cit.*, *supra* n. 44, p. 241; B. M. Magnússon, "Is There a Temporal Relationship between the Delineation and the Delimitation of the Continental Shelf beyond 200 Nautical Miles?" 28 *The International Journal of Marine and Coastal Law*, 2013, pp. 478-480.

(47) The function of CLCS in the delineation process of OCS becomes the issue to be examined.

(48) McDorman calls OCS under Article 76 of UNCLOS "legal" CS. McDorman, *op. cit.*, *supra* n. 34, p. 182. The concept of natural prolongation, the arguable basis for the entitlement to OCS is also regarded as a legal concept, McDorman, *op. cit.*, *supra* n. 46 (The International Legal Framework...), p. 168. See also, *supra* n. 36.

non-use of the CLCS procedures and non-compliance of the recommendations of CLCS.

In the examination of relationships between the function of CLCS and the entitlement to OCS, distinction is important between a party State and a non-party State to UNCLOS. This is because the entitlement to OCS of a non-party State raises a special issue as explained later. Here, in this Section, focus will be placed on a party State. The issue of the entitlement to OCS of a non-party State and possible impact on it of the function of CLCS will be touched upon in the next Section.

③ CLCS does not have any role to confer on a coastal State the entitlement to OCS. The basis, namely, natural prolongation from the coast confers on a coastal State the entitlement under Article 76, Paragraph 1. There is an opinion that this paragraph should be read with other paragraphs of Article 76. Nonetheless, it can be said that Article 76, Paragraph 1 or Paragraphs 1 to 7 may form the basis of the entitlement to OCS. CLCS has, if any, the function to legitimize the entitlement of a coastal State to OCS⁽⁴⁹⁾. Precisely speaking, CLCS legitimize limits of OCS, and as a result, the entitlement to OCS is also legitimized at the same time up to those limits.

The expression “legitimization” indicates the fact that the limit of OCS established on the basis of the recommendations of CLCS becomes final and binding under Article 76, Paragraph 8⁽⁵⁰⁾. The interpretation of this article can

(49) The expression “legitimization” is used by McDorman. T. L. McDorman, “The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World,” 17 *The International Journal of Marine and Coastal Law*, 2002, p. 319. The meaning of the “legitimization” in this paper is as it is explained here.

(50) Article 76, Paragraph 8 reads:

Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to

explain the function of CLCS in a delineation process of OCS⁽⁵¹⁾.

It is useful to explain first, the meaning of opposability.

Opposability means the legal effect, or it might be described as validity, solely in relation to other States that do not protest against the limits set by coastal States. It is different from legality, since legality is a term of universal application in relation to all the other States⁽⁵²⁾.

The limit of OCS unilaterally set by a coastal State without obtaining recommendations from CLCS has no chance to be opposable to other States. The same holds true with the limit set by a coastal State not on the basis of the recommendations of CLCS. With respect to such limits, categorically their opposability is denied. Other States should not approve such limits. “No chance” of opposability means this categorical denial of opposability.

coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.

(51) Based upon the understanding that the entitlement to OCS is a legal one, the authorities point out that no-use of the CLCS procedures would not have any influence on the entitlement to OCS. McDorman, *op. cit.*, *supra* n.49, p. 320, footnote 73; McDorman, *op. cit.*, *supra* n. 34, p. 191; T. L. McDorman, “The Continental Shelf beyond 200 NM: A First Look at the Bay of Bengal (Bangladesh/ Myanmar) Case,” in M. H. Nordquist et al. eds., *The Regulation of Continental Shelf: Rethinking International Standards*, Martinus Nijhoff Publishers, 2013, p. 99–100. Oude Elferink, *op. cit.*, *supra* n. 28, p. 277; ITLOS in the Bay of Bengal Case, *op. cit.*, *supra* n. 8, paras. 408–409.

(52) Typical example of the terminology of opposability is found in the ICJ judgment in the Fisheries Case. It found opposability of Norwegian straight baselines solely in relation to U. K. After considering concrete situations that had existed between the two States the court determined the opposability. The Fisheries Case, *op. cit.*, *supra* n. 17, p. 139. In French version of the judgment, ICJ used the term “opposer.” In the Nottebohm Case, ICJ used “validity” in the same meaning as the opposability. ICJ considered whether the nationality conferred on Nottebohm by Liechtenstein by means of naturalization can be validly invoked against Guatemala. The Nottebohm (Liechtenstein v. Guatemala), Second Phase, Judgment of 6 April 1955, *ICJ Reports 1955*, p. 17. In the Fishery Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland), it decided non-opposability of the extent of the fishery zone of Iceland in relation to U. K., Judgment of 25 July 1974, *ICJ Reports, 1974*, paras. 67–68, 71–72.

When a coastal State establishes the limit of its OCS on the basis of the recommendations of CLCS, the limit can be opposable. It is so in relation to other States if they do not protest against it⁽⁵³⁾. Even regarding the limit that is set on the basis of the recommendations of CLCS, other States can oppose it. They should be given opportunities to dispute concerning the following points: whether the limit is on the basis of the recommendations of CLCS; whether a basepoint, a maritime feature, is correct in generating OCS; whether a basepoint, an island, belongs to the coastal State; whether the baselines including straight baselines are appropriate in accordance with the relevant provisions of UNCLOS; and whether scientific data and technical information provided by the coastal State satisfactorily or appropriately prove the existence of OCS in accordance with paragraphs of Article 76.

If the limit of OCS set by a coastal State on the basis of the recommendation of CLCS is “final and binding” in relation to other States, they still have the possibility to dispute that the limit really is on the basis of the recommendation⁽⁵⁴⁾. In addition, they can dispute the issues that do not have a connection to

(53) Land, *op. cit.*, *supra* n. 37, para. 43. McDorman, *op. cit.*, *supra* n. 46 (The Outer Continental Shelf in the Arctic Ocean), p. 510. ITLOS and ICJ seem to have taken different positions in this issue. The judgment in the Bay of Bengal Case reads:

[T]he limits of the continental shelf beyond 200 nm can be established only by the coastal State. Although this is a unilateral act, the opposability with regard to other States of the limits thus established depends upon satisfaction of the requirements specified in article 76, in particular compliance by the coastal State with the obligation to submit to the Commission information on the limits of the continental shelf beyond 200 nm and issuance by the Commission of relevant recommendations in this regard.

If the “opposability” means “a chance of opposability”, ITLOS took the same position as this paper. The Bay of Bengal Case, *op. cit.*, *supra* n. 8, para. 407. In this regard, see, McDorman, *op. cit.*, *supra* n. 51, p. 99, footnote 53. In comparison, ICJ in the 2016 Nicaragua v. Colombia Case said “final and binding upon the party States to”UNCLOS. The 2016 Nicaragua v. Colombia Case, *op. cit.*, *supra* n 9, para. 108.

(54) CLCS cannot dispute this point, since in principle, judicial and arbitral procedures do not grant the necessary standing to CLCS.

the recommendations of CLCS, such as issues of territorial sovereignty of an island. Whether there is a significant difference between the two positions, namely, the positive or negative positions regarding the “final and binding” nature of the limit of OCS on the basis of the recommendations of CLCS in relation to other States, depends on the existence of a substantial difference of the opportunities for the other States to dispute such limits. If by disputing that the limit is set on the basis of the recommendations of CLCS the other States are allowed a wide possibility to dispute it, the difference between the two positions would not be so significant ⁽⁵⁵⁾.

In particular some remarks are needed regarding the last possible point of dispute above, namely, “whether scientific data and technical information provided by the coastal State satisfactorily or appropriately prove the existence of OCS in accordance with paragraphs of Article 76.” This point of dispute is within the competence of CLCS that is to consider submissions from coastal States in accordance with Article 76 ⁽⁵⁶⁾. In this sense, the interpretation of Article 76 is within the competence of CLCS ⁽⁵⁷⁾. However, CLCS does not provide an “authoritative” interpretation of the article in relation to other States.

(55) Kanehara, *op. cit.*, *supra* n.13, pp. 116–117.

(56) Article 3, Paragraph 1 of Annex II to UNCLOS reads:

The functions of the Commission shall be:

(a) to consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, and to make recommendations in accordance with article 76 and the Statement of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea;

(57) There may be a difference between the interpretation by scientists of CLCS and judges of judicial organs. In this regard, As for a positive remark of Oude Elferink, see, *supra* n. 21, Rothwell defines CLCS as a quasi-judicial process, and points out that CLCS’s interpretation of UNCLOS is a scientific one without the presence of lawyers. D. R. Rothwell, “Issues and Strategies for Outer Continental Shelf Claims,” 23 *The International Journal of Marine and Coastal Law*, 2008, pp. 188–189. As a negative side of the membership of CLCS, it does not contain any lawyers as its members. Nelson, *op. cit.*, *supra* n. 21.

Even if the interpretation by CLCS is authoritative, it would be so in relation to a coastal State that submits information to CLCS. This reflects the fundamentally bilateral nature of the CLCS procedures between CLCS and a coastal State⁽⁵⁸⁾. Therefore, other States should be able to dispute the limit set by a coastal State on the basis of the recommendations of CLCS in terms of the interpretation of Article 76. In comparison, the coastal State, when it has a different interpretation from that of CLCS concerning Article 76, it may re-submit the information to CLCS so as to ask for revised or renewed recommendations⁽⁵⁹⁾.

Thus, the meaning of “final and binding” under Article 76, Paragraph 8 is understood by using the concept of opposability. Actually authorities are not in accord regarding the interpretation of this provision⁽⁶⁰⁾. The reason will be

(58) Oude Elferink points out this bilateral understanding of the CLCS procedures. A. G. Oude Elferink, “The Establishment of Outer Limits of the Continental Shelf beyond 200 Nautical Miles by the Coastal States: The Possibilities of Other States to Have Impact on the Process,” *24 The International Journal of Marine and Coastal Law*, 2009, p. 549. This bilateral nature does not change in cases of joint submissions. Between CLCS and the States that form a group for a joint submission, there is a bilateral relation. Oude Elferink thinks that by considering observations from States other than coastal States that submit information to CLCS, it would bear a non-bilateral nature. See *infra*. n. 106.

(59) Article 8 of Annex II to UNCLOS.

(60) There is a position that the limit set by a coastal State on the basis of the recommendations of CLCS becomes “final and binding,” if other States do not protest against it. As for such a position, see, *supra* n. 53. McDorman gives a convincing reason for such a position. According to him, if “final and binding” means binding all the party States to UNCLOS, this could and probably should have been reflected in the dispute settlement procedures. UNCLOS fails to include such a provision. McDorman, *op. cit.*, *supra* n. 49, p. 318. Other positions are that such limit is “final and binding” in relation to all the party States to UNCLOS, or all the States including non-party States to UNCLOS. As for the former position, Gudmundur Eiriksson, “The Case of Disagreement between a Coastal State and the Commission on the Limits of the Continental Shelf,” M. H. Nordquist *et al* eds., *Legal and Scientific Aspects of Continental Shelf Limits*, Martinus Nijhoff Publisher, 2004, p. 256. As for the latter position, see, the citation by McDorman, *op. cit.*, *supra* n. 49, p. 314. The 2nd Report of the Commission on the Legal Issues of the Outer Continental Shelf (hereinafter referred to as the ILA 2nd Report) reads:

It would thus be impossible for an outer limit line that is final and binding on the coastal State

explained later in this paper why the provision is interpreted by this author in such a way ⁽⁶¹⁾.

④ In sum, with respect to the relationship between the function of CLCS and the entitlement to OCS, it is totally up to a coastal State whether it acquires opposability of the limit of its OCS in relation to other States ⁽⁶²⁾. The same holds true with the opposability of the entitlement to OCS up to that limit. Before a coastal State obtains the opposable limit to its OCS, it has the entitlement to OCS without any opposable limit of its OCS.

These considerations are with regard to party States to UNCLOS. As for the entitlement of party States to OCS it is not necessary to find its basis other than UNCLOS. This is not the case with non-party States to UNCLOS. Then, what is the basis of the entitlement to OCS of non-party States to UNCLOS? Would the issue of an extra-legal entitlement be broached again? Does or should CLCS have or should have the function to “legitimize” the entitlement of non-party States? These questions will be examined next. In this context, this paper will

not to be binding on other States or be subject to change.

If “other States” include non-party States, under this position, the outer limit set by the coastal State on the basis of recommendations from CLCS is “final and binding” in relation to all the States including non-party States to UNCLOS.

(61) This issue will be dealt with in connection to the protection of the legal interests of other States within the CLCS procedures in relation to submissions of coastal States to CLCS.

(62) A coastal State can explore and exploit its OCS without getting through the CLCS procedures. If overlapping is established, it can delimit OCS between other State (s). Including the delimitation conducted by a coastal State without completing the CLCS procedures, as for a general analysis of the delimitation of OCS, B. M. Magnússon, *The Continental Shelf Beyond 200 Nautical Miles*, Leiden, 2015. Especially the delimitation cases before the recommendations of CLCS, p. 209. See also, A. G. Oud Elferink, “Submission of Coastal States to the CLCS in Cases of Unresolved Land and Maritime Disputes,” in M. H. Nordquist et al eds., *Legal and Scientific Aspects of Continental Shelf Limits*, Martinus Nijhoff Publisher, 2004, p. 275; Kanehara, *op. cit.*, *supra* n. 13, pp. 114–118. Cf. The ILA 2nd Report, *op. cit.*, *supra* n. 60, pp. 216–217. These situations might be similar to those of non-party States to UNCLOS. However, a fundamental question should be considered as to on what the entitlement to OCS of non-party States to UNCLOS is based, which will be dealt with in the next Section.

propose a possible enlargement of the function of CLCS. An examination of the necessary limitation on the function of CLCS will follow this examination.

3. Possible Enlargement of the Function of CLCS in Relation to Non-Party States to UNCLOS

(1) Possible Entitlement to OCS of Non-Party States to UNCLOS to OCS

Many authorities have discussed the question whether a non-party State to UNCLOS has an obligation/right to get through the CLCS procedures⁽⁶³⁾. Before touching upon this issue, more fundamentally, a basis needs to be confirmed for the entitlement to OCS of non-party States to UNCLOS⁽⁶⁴⁾. This is because some authorities touch upon the inherent nature of the entitlement to OCS of non-party States to UNCLOS, when they argue a right of non-party States to use the CLCS procedures⁽⁶⁵⁾. This paper does not admit the inherent entitlement to OCS of non-party States to UNCLOS and their right to use the CLCS procedures, either.

(63) As for the position that non-party States to UNCLOS should have a right to use the CLCS procedures, for instance, B. M. Marnússon, “Can the United States Establish the Outer Limits of Its Extended Continental Shelf under International Law,” 48 *Ocean Development & International Law*, 2017, pp. 1-16; T. Treves, “UNCLOS at Thirty: Open Challenges,” 27 *Ocean Yearbook*, 2013, pp. 363-364. The expressions used by these authors, “can” and “may” imply that they presuppose a “right” of a non-party State to use the CLCS procedures. As explained later, this paper maintains that non-party States could not obtain the entitlement to their limits to OCS without using the CLCS procedures. This position is different from the position that while a non-party State may have the entitlement to OCS without obeying the CLCS procedures, it should submit information to CLCS to gain opposability of their limits to OCS. As such a position, for instance, McDorman, *op. cit.*, *supra* n.49, pp. 303-304.

(64) As for a general survey of the entitlement to OCS and the possible right or an obligation to use CLCS procedures of non-party States to UNCLOS, S. V. Busch, *Establishing Continental Shelf Limits beyond 200 Nautical Miles by the Coastal State — A Right of Involvement for Other States?* Brill/ Nijhoff, 2016, Chapter 11.

(65) Marnússon, *op. cit.*, *supra* n. 63, pp. 3-4, 12.

Different from party States to UNCLOS, non-party States cannot claim the entitlement to OCS according to Article 76, Paragraph 1 of UNCLOS ⁽⁶⁶⁾. If this article has become a customary rule ⁽⁶⁷⁾, a non-party State could seek the basis for the entitlement to OCS under this customary rule ⁽⁶⁸⁾.

Regarding CS, ICJ declared customary rule status to Article 1, Article 2, and Article 3 of CCS ⁽⁶⁹⁾. Therefore, non-party States to CCS may claim their entitlement to CS ⁽⁷⁰⁾. Does the same hold true with the entitlement to OCS ⁽⁷¹⁾?

(66) As explained before, even if the entitlement to OCS finds its basis in the maxim, “the land dominates the sea”, the basis is not understood as an extra-legal basis. Authorities and the jurisprudence have kept the validity of international law over the entitlement to both CS and OCS.

(67) Article 311 of UNCLOS provides for the relationship between customary international law rules and UNCLOS. As an examination of the Arbitral Award on the South China Sea Dispute with respect to its interpretation of Article 311, Kanehara, *op. cit., supra* n. 19, pp. 43–48. See also, Treves, *op. cit., supra* n. 63, pp. 52–53.

(68) Some authorities argue this issue without making any distinction between the entitlement to CS and that to OCS. McDorman, *op. cit., supra* n. 34, pp. 182–184.

(69) *Supra* n. 3.

(70) Japan is not a party State to CCS. However, following the ICJ judgment, in the North Sea Continental Shelf Case, Japanese courts found in the Odeko Nihon Case Japan’s entitlement to CS, since Japan may enjoy the entitlement based upon the customary rule on CS. Judgment of 22 April 1982, 33 (4) Tokyo District Court, *Gyosei Jiken Saiban Rei Shu (Administrative Cases Reports)*, p. 868.

(71) ITLOS declared a single regime for CS and OCS. As a logical conclusion, it may be decided that the entitlement to OCS, too, may have its basis on a customary rule, as well as that to CS. Thorough examination is required regarding whether CS and OCS should be dealt with as building a single regime under UNCLOS. Here it suffices to point out that both ICJ and ITLOS argued for the single regime of CS and OCS in the context of their jurisdiction to entertain the delimitation of OCS and to decide applicable rules to the delimitation. They did not give enough explanations to the single regime of CS and OCS. The Bay of Bengal Case, *op. cit., supra* n. 8, para. 361 *et seq.* In this regard, ITLOS followed the Arbitral Tribunal in the Case of Barbados and Trinidad and Tobago, Decision of 11 April 2006, *XXVII Reports of International Arbitral Awards*, para. 213. As a recent case in which a single regime for CS and OCS was declared, Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean, Judgment of 23 September 2017, rendered by the Special Chamber of ITLOS,

https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/C23_Judgment_23.09.2017_corr.pdf, para. 490.

In this regard, ICJ took the position in the 2012 Nicaragua v. Colombia Case that Article 76, Paragraph 1, has become a customary rule without examining the same issue regarding other paragraphs of the article⁽⁷²⁾. A cautious examination is really needed. Is it appropriate to identify solely Article 76, Paragraph 1 and to determine its status as a customary rule?

In Article 76, Paragraphs 3 to 7 are closely related to each other in order to delineate OCS⁽⁷³⁾. In addition, Paragraph 8 and Paragraph 9 provide for special procedures as to OCS. Therefore, the paragraphs of Article 76 need to be understood in an integrative manner. In other words, UNCLOS sets a “legal regime” of OCS⁽⁷⁴⁾. As a result, solely Paragraph 1 should not be treated as a customary rule⁽⁷⁵⁾.

As far as this legal regime exists solely under UNCLOS, it can be said to be as a *sui generis* legal regime, like the legal regime of the exclusive economic zones (EEZ)⁽⁷⁶⁾. In the case of EEZ, whether all the relevant provisions under

(72) Nicaragua maintained that Paragraphs 1–7 constitute customary international law. In comparison, Colombia argued that Paragraph 1 constitutes customary international law. The 2012 Nicaragua v. Colombia Case, *op. cit.*, *supra* n 8, paras. 116–117.

(73) In this regard, ITLOS in the Bay of Bengal Case interpreted the concept of natural prolongation while considering together with Paragraph 4 of Article 76, *supra*. n 32.

(74) Here, the term “regime” connotes integration of the relevant provisions relating to OCS, one of which cannot be separated from others. This is the legal effect of building a regime. It does not imply “a self-contained regime.” A self-contained regime includes in itself special implementation and dispute settlement mechanisms that depart from those under general international law.

(75) This conclusion can be derived, when it is considered that in the drafting process of Article 76, the package deal approach was adopted. Concerning this point, see, Magnússon, *op. cit. supra* n. 63, pp. 9–10.

(76) Even if the EEZ regime is a *sui generis* legal regime under UNCLOS, it would lose the meaning when the EEZ regime is admitted a status of customary international law. In Continental Shelf (Tunisia / Libyan Arab Jamahiriya), ICJ stated that:

(The exclusive economic zone) may be regarded as part of modern international law. Continental Shelf (Tunisia/ Libyan Arab Jamahiriya), Judgment of 24 February 1982, *ICJ Reports*, 1982, paras. 47, 100. In the Libya/ Malta Case, the Court stated that:

[T]he institution of the exclusive economic zone, ... is shown by the practice of States to have become a part of customary law.

UNCLOS form, as integration, a regime is not quite certain. In comparison, regarding OCS, the delineation, delimitation, exploration and exploitation of resources on OCS, and the special payment⁽⁷⁷⁾ from the interests earned by the exploitation of resources construct a legal regime. While the legal regime of OCS can contain these provisions, such as Article 77, Article 83, and Article 82, here it may be possible to focus solely on Article 76⁽⁷⁸⁾. If all the paragraphs of Article 76 became customary rules, the legal regime would depart from the *sui generis* status under UNCLOS. However, it is not likely that all the paragraphs of Article 76, as integration, have acquired a customary law status⁽⁷⁹⁾, not to mention that this examination is not automatically applied to CS⁽⁸⁰⁾. Concerning CS, the relationship between EEZ and CS also requires particular consideration⁽⁸¹⁾

(2) “Obligation” to Be Imposed on Non-Party States to UNCLOS to Get Through the CLCS Procedures If They Desire to Enjoy the Entitlement to OCS

The ramification of this interpretation is that a non-party State should not be allowed to take up Article 76, Paragraph 1, and seek under this paragraph the

Op. cit., *supra* n. 10, para. 34.

(77) Article 82 provides for the special payment that should be made from the exploitation benefit of OCS.

(78) See, Busch, *op. cit.*, *supra* n. 64, pp. 280–282.

(79) As President of the Third Conference, Tommy Koh stated that Article 76 contains new law. In addition, he said that because of the revenue-sharing mechanism under Article 82, a non-party State to UNCLOS cannot invoke the benefits of Article 76. Third United Nations Conference on the Law of the Sea, XVII *Official Records*, 193rd Meeting United Nations, 1984, para. 48. Regarding non-customary law status of Article 76, see also, T. Treves, “La limite extérieure du plateau continental: Evolution récente de la pratique,” 35 *Annuaire française de droit international*, 1989, pp. 725–727; Hutchinson, *op. cit.*, *supra* n. 36, pp. 173–179.

(80) As mentioned above, concerning CS, ICJ in the North Sea Continental Shelf Case, declared the customary international law status of Articles 1 to 3 of the CCS. *Supra* n. 3,

(81) See, Kanehara, *op. cit.*, *supra* n. 19, pp. 65–66.

basis of its entitlement to OCS. A non-party State should accept as a whole the legal regime of OCS under UNCLOS, if it desires to enjoy the entitlement to OCS. Therefore, if a non-party State intends to have OCS, it needs to obey the CLCS procedures. This is because the entitlement to OCS and the CLCS procedures are inseparably connected and integrated to each other as integration so as to build the legal regime of OCS⁽⁸²⁾. In this regard, the ICJ judgment in the 2012 Nicaragua v. Colombia Case is instructive. It declared the obligation of Nicaragua, a party State to UNCLOS, to submit information to CLCS toward a non-party State, Colombia⁽⁸³⁾. As the reason for that ICJ stated that:

The Court recalls that UNCLOS, according to its Preamble is intended to establish “a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful use of the seas and oceans, the equitable and efficient utilization of their resources.” The Preamble also stresses that “the problems of ocean space are closely

(82) If the inherency is emphasized of the entitlement to OCS as well as that to CS, a conclusion would be derived that the entitlement to OCS is based upon customary international law. In this regard, the opinion was voiced in the drafting process of Article 76 that a non-party State to UNCLOS can and does exercise exclusive jurisdiction over the resources of the continental margin adjacent to its 200 nautical mile zone where a physical margin exists, consistent with the international law of the sea. Concerning the U. S., position, see, McDorman, *op. cit., supra* n. 46 (The Outer Continental Shelf in the Arctic Ocean), p. 505. In addition, a similar position was taken by Canada by referring to the so-called exploitability test under Article 1 of CCS. As for such a position, see, Oude Elferink, *op. cit., supra* n. 28, pp. 270–271. The exploitability test can be set aside, since when the test was drafted, the “exploitability” of OCS could not be presupposed. If a non-party State to UNCLOS can claim the entitlement to OCS under international law of the sea, namely, customary international law, such an opinion would very likely bring the conclusion that Article 76, Paragraph 1 is to be given a customary international law status without forming part of the legal regime of OCS. As explained in this Section, picking up solely Paragraph 1 of Article 76 is not appropriate as the interpretation of the provision. Furthermore, in order to maintain the international regulation over OCS toward non-party States to UNCLOS, to make them obey whole the regime of OCS under UNCLOS would be critical, including the compliance of non-party States of the CLCS procedures.

(83) The 2012 Nicaragua v. Colombia Case, *op. cit., supra* n. 8, para. 127.

interrelated and need to be considered as a whole.” Given the object and purpose of UNCLOS, as stipulated in its Preamble, the fact that Colombia is not a party thereto does not relieve Nicaragua of its obligations under Article 76 of that Convention ⁽⁸⁴⁾.

It is proper to emphasize the obligation to use the CLCS procedures in accordance with the object and purpose of UNCLOS. However, that obligation should not be imposed solely on a party State. Non-party State should also owe the same obligation, if it intends to have OCS ⁽⁸⁵⁾.

In addition, in order to build the legal regime of OCS that should apply even to non-party States to UNCLOS, not a right but an obligation should be presupposed for using the CLCS procedures ⁽⁸⁶⁾. The point is whether a non-

(84) *Ibid.*

(85) There are States that concluded delimitation agreements with non-party States to UNCLOS regarding OCS. As for such agreements with the U. S. as a party to the agreements, Magnússon, *op. cit.*, *supra* n. 63, p. 8. The grounds on which these States recognize the entitlement of the non-party States may be variable: customary international law; the delimitation agreements if they contain the provision therefor; an extra-legal basis. The last choice would throw international law relating to OCS into a serious danger. Therefore, it is preferable to interpret those States' attitude as recognizing the entitlement to OCS of non-party States as being based upon customary international law or upon the delimitation agreements. Even if the entitlement to OCS of non-party States is based upon customary international law, as explained in this Section, non-party States should not be exempted from the obligation to use the CLCS procedures. Non-party States to UNCLOS should get through the CLCS procedures to obtain a chance of opposability for the limits of OCS and also for the entitlement to OCS up to the limits in relation to party States to UNCLOS. Considering the examination here and *supra* n. 82, if, apart from the issue of the independence of Article 76, Paragraph 1, the very CLCS procedures confer the chance of opposability for limits of OCS and also the entitlement to OCS up to the limits, between party States to UNCLOS, and between a party State and a non-party State to UNCLOS, there would not exist significant meaning in granting a non-party State to UNCLOS the entitlement to OCS based upon customary international law. When the entitlement to OCS of non-party States is recognized by the delimitation agreements, it is opposable solely in relation to the party States to the agreement.

(86) In addition to the authorities cited in *supra* n. 63, considering the use of the term “may” it is interpreted that Roughton and Trehearne think there is the right of non-party States to use the CLCS procedures. Roughton and Trehearne, *op. cit.*, *supra* n. 37, p. 161. McDorman argues the

party State has a right/ obligation to use the CLCS procedures, not a right to explore and exploit OCS⁽⁸⁷⁾. It is pointed out that non-party States would not exercise such a right, since it would be burdensome on them to collect the necessary information⁽⁸⁸⁾. The legal regime of OCS really needs to consider this reality so as to induce non-party States to use the CLCS procedures.

Here the examination does not purport to argue UNCLOS as it is, from the perspective of the law of treaties⁽⁸⁹⁾. Its purpose is to provide a view of the possible development of the legal regime of OCS by adding appropriate amendments to UNCLOS, if necessary.

(3) Possible Competence of CLCS to Consider Submissions from Non-Party States to UNCLOS

On the CLCS side, it should be given the capacity to consider submissions from non-party States to UNCLOS and deliver recommendations⁽⁹⁰⁾. The legal ground for such a capacity may be found in Annex II to UNCLOS, Article 3, (1) (a) which reads “submitted by coastal States” without making distinction between party and non-party States to UNCLOS⁽⁹¹⁾. When CLCS asked the question whether it may receive information from non-party States to

obligation of non-party States to use the CLCS procedures, McDorman, *op. cit.*, *supra* n. 49, p. 304.

(87) Concerning the latter point, as the relationship between the issue of the entitlement to OCS and the right to explore and exploit it in cases of party States to UNLOS, see *supra* n. 62. Concerning delimitation agreements that, as their parties, have non-party States to UNCLOS, see *supra* n. 85.

(88) T. Treves, “Remarks on Submissions to the Commission on the Limits of the Continental Shelf in Response to Judge Marotta’s Report,” 21 *The International Journal of Marine and Coastal Law*, 2006, p. 364.

(89) As an examination from the perspective of the law of treaties, Busch, *op. cit.*, *supra* n. 64, p. 264; Marnússon, *op. cit.*, *supra* n. 63, p. 6.

(90) There is an opinion that CLCS should not reject the submission by non-party States to UNCLOS. M. Sh. Gau, “The Commission on the Limits of the Continental Shelf as a mechanism to Prevent Encroachment upon the Area,” 10 *Chinese Journal of International Law*, 2011, p. 9.

(91) Roughton and Trehearne, *op. cit.*, *supra* n. 37, p. 161.

UNCLOS⁽⁹²⁾, the Meeting of the State Parties to UNCLOS (SPLOS) did not give an answer⁽⁹³⁾. Some authorities point out that there is no prohibition on a coastal State, which is a non-party State to UNCLOS, to submit information to CLCS⁽⁹⁴⁾. To secure the CLCS function, appropriate amendments to UNCLOS and the relevant documents would be required in order to clarify the competence of CLCS to receive and consider submissions from non-party States to UNCLOS⁽⁹⁵⁾.

If such a competence is admitted and actually exercised by CLCS, it would contribute to maintaining the international legal order of the oceans regarding OCS⁽⁹⁶⁾. As far as the legal regime of OCS is concerned, UNCLOS “spills over”

(92) CLCS asked the Meeting of the State Parties to UNCLOS for clarification or recommendation on the phrases “a coastal State” and “a State” under Article 4 of Annex II to UNCLOS. CLCS/4, para. 12 (a). Article 4 also provides for “coastal State” without making distinction between party non-party States. Article 4 reads:

Where a coastal State intends to establish, in accordance with article 76, the outer limits of its continental shelf beyond 200 nautical miles, it shall submit particulars of such limits to the Commission along with supporting scientific and technical data as soon as possible but in any case within 10 years of the entry into force of this Convention for that State. The coastal State shall at the same time give the names of any Commission members who have provided it with scientific and technical advice.

(93) *Report of Eighth Meeting of State Parties*, 4 June 1998, SPLOS/31.

(94) Marnússon, *op. cit.*, *supra* n. 63, p. 6; Busch, *op. cit.*, *supra* n. 64, pp. 279–280.

(95) Wolfrum asserts that, if non-party States cannot invoke the benefit of Article 76, Paragraph 8, the result could be that non-party States enjoy only a theoretical entitlement to their OCS. See, citation by Busch, *op. cit.*, *supra* n. 64, p. 282. Busch argues that even though non-party States may not make OCS submission to CLCS, their entitlement to OCS remains the same. *Ibid.* The author of this paper takes a position that the entitlement to OCS of non-party States is not recognized apart from their compliance of the CLCS procedures. Non-party States do not have a right but an obligation to get through the CLCS procedures. When they do not obey the obligations under the OCS regime of UNCLOS as a whole, especially the use of the CLCS procedures, their entitlement to OCS itself would not be established. Therefore, there is no room for the entitlement to OCS of non-party States to remain solely theoretical. The limits of OCS set by them on the basis of the recommendations from CLCS obtain a chance of opposability as is the case of party States to UNCLOS. The chance of opposability of the limits of their OCS and, at the same time, of the entitlement to OCS up to the limits depends on their implementation of the obligations under the OCS regime of UNCLOS.

toward non-party States to UNCLOS.

As examined before, mainly focusing on the entitlement to CS and OCS, international law has continuously tried to maintain its validity over CS and OCS. The possible contribution of CLCS to the international legal order of the oceans is totally in line with the current achievement of international law⁽⁹⁷⁾.

This is a possible enlargement of the function of CLCS. Next, the limitation on it will be examined, considering mainly the legal interests to be protected by CLCS.

4. Limitation on the CLCS Function

(1) Involvements of States Other Than a Coastal State in the CLCS Procedures

As is mentioned in the Introduction, States other than a coastal State⁽⁹⁸⁾ have been involved in the CLCS procedures by submitting observations⁽⁹⁹⁾ in

(96) The number of non-party States that are expected to claim the entitlement to OCS is five: the U. S., Venezuela, Colombia, Western Sahara, Peru. Bosch, *op. cit., supra* n. 64, p. 261. It would not be so burdensome on CLCS, if all these States submit information to it. Concerning the U. S. position, see, Magnússon, *op. cit., supra* n 63, pp. 4-5.

(97) Although the ruling of ICJ in the 2012 Nicaragua v. Colombia Case is “one-sided” in that it solely declared the obligation of a party State, Nicaragua, to submit information to CLCS toward a non-party State, Colombia, the expectation on UNCLOS by ICJ is the same as the position of this paper.

(98) “Other States” may include both party States and non-party States to UNCLOS. M. Sh. Gau, “Third Party Intervention in the Commission on the Limits of the Continental Shelf Regarding a Submission Involving a Dispute,” 40 *Ocean Development & International Law*, 2009, p. 72. In the following examination, since CLCS has accepted observations from non-party States to UNCLOS, no distinction will be made between party States and non-party States, as far as it is appropriate to do so. Here also, beyond UNCLOS it is even possible for CLCS to maintain the international legal order of the oceans with regard to OCS. This is because non-party States have submitted observations to CLCS relating to submission from coastal States, and at least partially they have been taken up by CLCS.

relation to submissions from coastal States⁽¹⁰⁰⁾. Thus far, CLCS has accepted these observations, although there is a case in which CLCS denied to take up the observation from the U. S. in relation to the submission from Brazil⁽¹⁰¹⁾.

The point to be emphasized is that there should be a limitation on the observations to be accepted for its consideration by CLCS. The limitation can be determined by the nature of the CLCS procedures and the legal interests⁽¹⁰²⁾ that it can and should protect.

(2) Bilateral Nature of the CLCS Procedures

① It is firmly established that CLCS is an autonomous body⁽¹⁰³⁾. It does not represent any entities, such as International Seabed Authority⁽¹⁰⁴⁾ and SPLOS, if

(99) The following provisions are said to be grounds for other States to submit observations: Rules 50 and 51, Paragraph 1 of the Rules of Procedure of CLCS; Annex III to it, Parts II, Paragraph 2 (a) (iv)—(v) and (b). M. Sh Gau, “Recent Continental Shelf Submissions by Countries in East Asia and Third Party Notifications,” in J. M. Van Dyke *et al.* eds., *Governing Ocean Resources — New Challenges and Emerging Regimes, A Tribute to Judge Choon-Ho Park*, Martinus Nijhoff Publisher, 2013, p. 204, footnote 49.

(100) As a thorough examination of the issue relating to other States’ involvement in the CLCS procedures, Bosch, *op. cit. supra* n. 64.

(101) CLCS/42, para. 17; CLCS/44, para. 17. As confirmed below, this rejection by CLCS is not for the reason that the U. S. is a non-party State to UNCLOS, but for the reason that it is not a party to a dispute with the coastal State, Brazil.

(102) Whether the interests to be protected in the CLCS procedures are solely “legal” interests need to be well considered. Here, since the examination is conducted based upon UNCLOS and other relevant legal documents, the interests can be presupposed to be legal interests.

(103) McDorman, *op. cit., supra* n. 49, p. 311; the same author, *op. cit., supra* n. 51, p. 94.

(104) The typical example that indicated the involvement in the delimitation of OCS of the general interest of international society in the deep sea-bed, is the arbitral award on the delimitation in the region of Saint Pierre and Miquelon. Arbitral Award of 10 June 1992, Canada/ France, XXI *Reports of International Arbitral Awards*, 1992, para. 78. McDorman clearly denies that CLCS represents the International Seabed Authority, or in other words, the general interest of international society in the deep sea-bed. T. L. McDorman, “Revisiting the Commission on the Limits of the Continental shelf: ‘A Technical Body in a Political World,’” in M. H. Nordquist *et al.* eds., *Legal Order in the World’s Oceans — UN Convention on the Law of the Sea*, Brill/ Nijhoff, 2018, p. 291.

the latter is called an entity⁽¹⁰⁵⁾. CLCS functions on a bilateral basis between a coastal State and CLCS⁽¹⁰⁶⁾. In cases of joint submissions, too, the bilateral nature can be kept between the group of submitting States and CLCS. The States in the group share OCS, such as France, Ireland, Spain, and the U. K. with respect to OCS in the area of the Celtic Sea and the Bay of Biscay⁽¹⁰⁷⁾. Therefore, CLCS may deal with solely the legal interests of the coastal State that submits information to CLCS. This requires CLCS to refrain from touching upon and impacting the legal interests of other States. Then, what are “other States”?

Concerning this question, two limitations are derived from the competence and the nature of the function of CLCS. First, it does not have the competence to protect the legal interests to be realized by a correct interpretation of articles under UNCLOS that is not within the competence of CLCS⁽¹⁰⁸⁾. Second, it should refrain from touching upon and impacting the legal interests of “a third party.” In this context, “a third party” means States other than a coastal State, since the CLCS procedures have the bilateral nature between a coastal State and CLCS. Succinct examination will be given for these issues in this order.

② Regarding the first point, CLCS has the competence to interpret Article 76 in

(105) The relationship between CLCS and SPLOS may need further examination. Here, it suffices to confirm that CLCS does not represent SPLOS.

(106) As for the bilateral understanding of the CLCS function, Oude Elferink, *op. cit.*, *supra* n. 58, p. 549. Oude Elferink states that:

The LOS Convention (UNCLOS, by the author) does not envisage any role for third State in the consideration by the Commission (CLCS, by the author) of a submission by a coastal State. Allowing third State to submit information to be taken into account in the consideration of a submission would imply a major departure from the LOS Convention.

See also, *op. cit.*, *supra* n. 28, p. 276. However, Oude Elferink does not deny the impact caused by the CLCS procedures on States other than coastal States that submit information to CLCS. See also, Roughton and Trehearne, *op. cit.*, *supra* n. 37, p. 164.

(107) [Http://www.un.org/depts/los/clcs_new/submissions_files/submission_frgbires.htm](http://www.un.org/depts/los/clcs_new/submissions_files/submission_frgbires.htm).

(108) CLCS has the competence to interpret Article 76 of UNCLOS in considering submissions from coastal States. See the next footnote.

considering submission from a coastal State ⁽¹⁰⁹⁾. It is not appropriate to require CLCS to protect other legal interests, such as common interests regarding common heritage of mankind and legal interests to be protected by a correct interpretation of provisions of UNCLOS other than Article 76. In the CLCS practice, examples can be found of the observations from other States relating to the interpretation of Article 121 ⁽¹¹⁰⁾ and articles on baselines ⁽¹¹¹⁾. States should not be allowed to submit observations to CLCS that raise questions beyond its capacity ⁽¹¹²⁾. By accepting such observations, the smooth and proper function of CLCS would be hampered. CLCS should reject taking up such observations.

In this regard, CLCS has appropriately taken a restrictive position. With respect to the observations from China and Korea ⁽¹¹³⁾ in relation to Japan's

(109) This point is clear by Article 3, Paragraph 1 of Annex II to UNCLOS, see, *supra* n. 56.

(110) The observations from South Korea and China in relation to Japan's submission of information to CLCS opposed the status of island to be given to Oki-no-Tori Shima under Article 121 of UNCLOS that can generate OCS. This issue relates to the interpretation of Article 121, Paragraph 3 of UNCLOS. In relation to Japan's submission, both China and Korea issued observations. As for the Chinese communication of 6 February 2009, http://www.un.org/depts/los/clcs_new/submissions_files/jpn08/chn_6feb09_e.pdf. As for the Korean communication of 27 February 2009, http://www.un.org/depts/los/clcs_new/submissions_files/jpn08/kor_27feb09.pdf.

(111) For instance, in relation to the Russian submission the U. S. submitted its observation which mentioned baselines as well as other issues. As for the U. S. communication of 28 February 2002, http://www.un.org/depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS_USAtext.pdf.

(112) There are submissions from claimant States to Antarctica under the Antarctica Treaty. CLCS has deferred such submissions. As a possible categorization of the observations, see, Bosch, *op. cit.*, *supra* n. 64, pp. 236-242. The observations from non-claimant States in relation to submissions from claimant States can be regarded as those from parties to a territorial or land dispute with claimant States. As such a position, for instance, Gau, *op. cit.*, *supra* n. 90, p. 20. Among the eight States that submitted observations, the Netherlands clearly took this position. Note from the Netherlands of 31 March 2005 in relation to the Australian submission to CLCS, http://www.un.org/depts/los/clcs_new/submissions_files/aus04/clcs_03_2004_los_nl.pdf.

(113) Concerning the observations, it is argued that they are related to the interpretation of Article 76. M. Sh. Gau, "Recent Decisions by the Commission on the Limits of the Continental Shelf on Japan's Submission for Outer Continental Shelf," 11 *Chinese Journal of International Law*,

submission of information to CLCS, CLCS understood that the interpretation of Article 121 is not within its competence⁽¹¹⁴⁾.

③ If there is a difference of opinions relating to some provisions other than Article 76 of UNCLOS, CLCS may rely on the submissions from the coastal State as being based upon *prima facie* correct interpretation of those provisions. By doing so, CLCS can proceed to recommendations to the coastal State. The fast and smooth function of CLCS would be secured by disregarding observations from other States that maintain a different interpretation from that of the coastal State. Thus, to restrict the observations that are to be accepted and considered by CLCS does not purport to limit its function. Rather such restriction promotes its function properly to consider submissions from coastal States.

However, the issue remains relating to the necessary protection of the legal interests of other States, since CLCS does not confer protection of the legal

2012, p. 501. However, whether the land or maritime feature concerned extends natural prolongation toward the sea and whether the land or maritime feature concerned generates EEZ and CS and OCS are different issues from each other. On the one hand, natural prolongation can be determined regarding a maritime feature that falls under Paragraph 3 of Article 121. On the other hand, Article 121, Paragraph 3 determines the conditions on which a maritime feature can generate EEZ and CS and OCS irrespective of its natural prolongation toward the sea according to Article 76, Paragraph 1. Japan, and China and Korea, and CLCS, too, are in accord in that the legal status of Oki-no-Tori Shima is an issue relating to the interpretation of Article 121, Paragraph 3.

(114) CLCS/ 62, paras. 54, 59; CLCS/ 64, paras. 22–25. The submitting State Japan, and China and Korea were in accord in that they think the interpretation of Article 121, Paragraph 3 is beyond the competence of CLCS. They differed as to whether this interpretative issue is irrelevant to (Japan) or inseparable from (China and Korea) the consideration by CLCS of Japan's submission. As examinations of Japan's submission, Gau, *op. cit.*, *supra* n. 113, p. 487 *et seq.*; Bosch, *op. cit.*, *supra* n. 64, p. 198 *et seq.* The CLCS determined the existence of "matters" so as to defer its recommendation in the southern part of Oki-no-Tori Shima, namely the Southern Kyushu Palau Ridge Region. It is not understandable that CLCS deferred its recommendation as to this without finding any existence of a dispute. This relates to the second point that will be examined next.

interests by taking up and considering those observations. In cases of the interpretation of Article 76 that is within the competence of CLCS, it can receive and consider the observations from other States. When it renders its recommendations by interpreting Article 76, that interpretation has an advisory impact solely on the coastal State that submits the information to it. The interpretation of Article 76 of CLCS may be authoritative solely for the coastal State, not for other States. Accordingly, other States should be able to dispute the limit of OCS set by the coastal State on the basis of the recommendation from CLCS including the interpretation of Article 76 by CLCS. The same holds true with the cases of the interpretation of other provisions of Article by CLCS. In these cases, too, other States should be given opportunities to dispute at appropriate fora the limit of OCS set by a coastal State even on the basis of the recommendations of CLCS. Judging from the CLCS practice, the disputes may relate to issues, such as the interpretation of Article 121, Paragraph 3⁽¹¹⁵⁾, and an interpretation of provisions regarding baselines⁽¹¹⁶⁾.

As explained before in this paper, the limits set by a coastal State on the basis of the recommendations of CLCS have solely a chance of opposability⁽¹¹⁷⁾. If other States do not protest against these limits, they can be opposable to them. Considering the common interest to be protected from encroachment on the deep sea-bed, the possible procedure of *action popularis*⁽¹¹⁸⁾ and standing at appropriate fora to be given to the International Seabed Authority⁽¹¹⁹⁾ may be

(115) Regarding the observations from South Korea and China in relation to Japan's submission, see, *supra* n. 110.

(116) Concerning the observation from the U. S. in relation to the Russian submission, *supra* n. 111.

(117) See, Section 2.

(118) Concerning this issue, L. D. M. Nelson, "Claims to the Continental Shelf beyond the 200-mile Limit," in R. Wolfrum *et al.* eds., *Liber Amicorum Guenter Yaenicke-Zum* 85, Springer, 1999, pp. 581-582. Cf. Eiriksson, *op. cit.*, *supra* n. 60, p. 258.

(119) Concerning this issue, see, Nelson, *op. cit.*, *supra* n. 118, p. 575; Nelson, *op. cit.*, *supra* n. 21, p. 1250.

argued⁽¹²⁰⁾.

It is pointed out that prevention of disputes by the function of CLCS is preferable rather than their settlement after its recommendation⁽¹²¹⁾. According to this position, a conclusion might be derived that CLCS should widely take up and consider observations from other States⁽¹²²⁾. By doing this, CLCS could prevent future disputes that could emerge, at least to a certain degree, between the coastal State and other States. It is agreeable that CLCS is not a dispute settlement mechanism as CLCS itself declared so⁽¹²³⁾. When dispute prevention is mentioned, some implementation mechanism of UNCLOS realized by CLCS may be presupposed rather than a dispute settlement mechanism⁽¹²⁴⁾. In any way, since the budget and members of CLCS are limited, and above all the CLCS procedures have a bilateral nature, it had better confine itself to working on the observations that deal with issues within its reach of competence.

④ With respect to the second point above, namely, necessary refrainment of the CLCS function not to influence upon other States, mainly by Annex I to the Rules of Procedure of CLCS (ROP)⁽¹²⁵⁾, legal interests are protected concerning

(120) Treves points out that the legal interests to be influenced by the delineation of OCS are not confined to those of coastal States. He endorses the tolerant acceptance by CLCS of observations from non-party States from this perspective. Treves, *op. cit., supra* n 88, pp. 364-365.

(121) As such a position, Gau, *op. cit., supra* n .90, p. 6.

(122) Gau, *op. cit., supra* n. 98, p. 73.

(123) Note by the Secretariat at the Opening Meeting of CLCS, 1 May 2000, CLCS/26, 20 January 2005, para. 9.

(124) However, the author who maintains the preferable dispute prevention rather than dispute settlement (see, *supra* n .121), said in another work that CLCS is an important forum for settling legal disputes. Gau, *op. cit., supra* n. 113, p. 502. In addition, he said that CLCS is a forum for other States (third States) to make declarations so that they will not be deemed to have acquiesced to a position revealed in a submission of a coastal State. It is not easy to coherently understand the author's position. There may be some incoherency among these two works.

(125) Article 46 of Rules of Procedure, Paragraph 5 (a) reads:

In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior

the party States to delimitation or maritime and land disputes with a coastal State that submits information to CLCS. This is because when such disputes exist, CLCS should refrain from discharging its function ⁽¹²⁶⁾. By refraining from its function, CLCS protects these legal interests.

CLCS has taken a restrictive approach in this regard. It rejected taking up the observation from the U. S. in relation to the submission from Brazil ⁽¹²⁷⁾. It said:

[T]he Commission noted that both annex II to the Convention (UNCLOS, by the author) and the rules of procedure of the Commission provided for only one role to be played by other States...Only in case of a dispute between States with opposite or adjacent coasts or in other cases of unresolved land or maritime disputes would the Commission be required to consider communications from States other than the submitting one ⁽¹²⁸⁾. While CLCS itself has not been coherent ⁽¹²⁹⁾, in order to keep its function to be

consent given by all States that are parties to such a dispute.

- (126) Without prior consent by parties to the disputes, CLCS may not consider the submission of a coastal State. As for examples of CLCS's deferral based upon the existence of disputes, see, the list provided by Busch, *op. cit.*, *supra* n. 64, pp. 396-409.
- (127) Regarding the CLCS position, see *supra* n. 101.
- (128) CLCS/42, para. 17; CLCS/44, para. 17.
- (129) Concerning Japan's submission, CLCS deferred its recommendation regarding the Southern Kyushu Palau Ridge Region. As mentioned above, China and Korea submitted observations relating to the interpretation of Article 121, Paragraph 3. CLCS recognized that this interpretative issue is out of its competence to interpret Article 76. It said that:

The Commission considered that it would not be in a position to take action on the parts of the recommendations relating to the Southern Kyushu-Palau Ridge Region until such time as *the matters* referred to in the communications referred to above have been resolved (emphasis added).

Summary of Recommendation of the Commission on the Limits of the Continental Shelf in Regard to the Submission made by Japan on 12 November 2008,

http://www.un.org/depts/los/clcs_new/submissions_files/jpn08/com_sumrec_jpn_fin_fin.pdf, para. 20. Without determining the existence of a dispute between Japan, on the one hand, and China and Korea, on the other hand, CLCS substantially accepted and considered the observations from the latter States, as far as it refrained from rendering a recommendation in relation to the Southern

securely fulfilled, it is preferable to restrict observations that are to be accepted and considered by it. It suffices here to endorse the restrictive position taken by CLCS in order to discuss the limits on the CLCS function. It should be repeated that the proposal of limits on the CLCS function does not purport to reduce its capacity, but to secure its proper function without being hampered.

⑤ This paper does not focus on Paragraph 5 (a) of Annex I to ROP⁽¹³⁰⁾. It has been discussed that this provision may hamper the CLCS' proper function⁽¹³¹⁾. Therefore, it is appropriate to make some suggestions as to how to deal with this issue⁽¹³²⁾.

Kyushu Palau Region. It is not explicable why CLCS accepted and considered the observations from China and Korea, although they are not parties to a dispute with Japan. There might be an opinion that there are disputes between Japan and China and between Japan and Korea. In this regard, it suffices here to confirm that in the ICJ jurisprudence the concept of a dispute has been prudently formulated and that ICJ in a recent case strictly defined it. Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment of 5 October 2016, <http://www.icj-cij.org/files/case-related/160/160-20161005-JUD-01-00-EN.pdf>, paras. 47-57. One authority maintains that CLCS should widely accept and consider observations from other States. According to such a position, the attitude of CLCS regarding Japan's submission is positively evaluated. It is said that CLCS widened the concept of "dispute" by using the term "matter," and it treated China and Korea as if they were parties to a dispute with Japan under Paragraph 5 (a) of Annex I to ROP. Gau, *op. cit.*, *supra* n. 113, p. 499. The author of this paper has a different position from this. First, CLCS can secure its proper function by restricting observations from other States to be accepted and considered by it, rather than widening their scope. This is because with the limited budget and its membership, it had better confine itself to fulfilling the function that is given to it by UNCLOS and the relevant documents. Second, when a dispute is not found, CLCS should consider submissions from coastal States. By widening the concept of "dispute" so as to cover a "matter," CLCS would tie their hands more than Paragraph 5 (a) of Annex I to ROP requires.

(130) As for Paragraph 5 (a) of Annex I to ROP, see *supra* n. 125.

(131) Concerning this issue with respect to Japan's submission to CLCS, Y. Kagami, K. Nishimoto and Y. Nishimura, "Issues Regarding the Recommendation of the Commission on the Limits of the Continental Shelf on the Submission by Japan," available at SSRN: <http://ssrn.com/abstract=2740277>.

(132) As an examination of Paragraph 5 (a), A. Oude Elferink, "Paragraph 5 (a) of Annex I to the Rules of Procedure of the Commission on the Limits of the Continental Shelf: Solution to a

First of all, the two discussions need to be distinguished from each other: one is a discussion of problems raised by Paragraph 5 (a) of Annex I to ROP as it is; the other is a discussion of possible amendments of the provision. They will be examined in this order as the second and the third points.

Second, the problems raised by the provision as it is are, for instance, as follows: the burden on CLCS to decide the existence of a dispute under the provision; the impasse caused on the CLCS function by the provision⁽¹³³⁾; the inappropriate limitation of the CLCS function by the existence of the three types of disputes, namely, delimitation dispute, land dispute, and maritime dispute⁽¹³⁴⁾; and controversy relating to the meaning of these types of disputes⁽¹³⁵⁾.

Program or Problem without a Solution?" In M. H. Nordquist *et al.* eds., *Legal Order in the World's Oceans — UN Convention on the Law of the Sea*, Brill/ Nijhoff, 2018, p. 302 *et seq.*

(133) ITLOS used the expression "impasse" to describe the situation in which CLCS cannot function due to the existence of a dispute under Paragraph 5 (a). The Bay of Bengal Case, *op. cit.*, *supra* n. 8, para. 392.

(134) Y. Nishimura, "Tairikudana Enshin to Tairikudana Genkaiinkai Tetsuduki Kisoku no Mondai Ten (Extension of Continental Shelf and Problems of the Rules of Procedures of CLCS)," in Matsui *et al.* eds., *Agendas in the 21st Century of International Law and the Law of the Sea*, 2016, Toshindo, pp. 403-411.

(135) Particularly the term "a maritime dispute" may imply a broad meaning. Japan recently invoked Paragraph 5 (a) in its observation in relation to the submissions from China and Korea to CLCS. Japan maintained that since the distance between the coasts of Japan, on the one hand, and China or Korea, on the other hand, is less than 400 nautical miles, the delimitation of CS should be conducted in accordance with Article 83 of UNCLOS. There is a difference of opinion regarding the natural prolongation in the sea-bed area concerned. Both China and Korea claim that the natural prolongation from their land into the sea-bed reaches Okinawa Trough so as to generate their OCS. Japan denies that. Although Japan mentioned in its communication that delimitation is not yet determined, this dispute is relating to the identification of the natural prolongation in the sea-bed concerned. Such a dispute is not identified as a delimitation dispute. Therefore, it is regarded as a maritime dispute. Japan's Note Verbale of 28 December 2012 in relation to China's submission, http://www.un.org/depts/los/clcs_new/submissions_files/chn63_12/jpn_re_chn_28_12_2012.pdf. Japan's Note Verbale of 11 January 2013 in relation to Korea's submission, http://www.un.org/depts/los/clcs_new/submissions_files/kor65_12/jpn_re_kor_11_01_2013.pdf.

In order to argue these issues, above all an examination is required regarding to what extent the CLCS function has been actually hampered. Some authority confirms that according to recent count, seventeen of the submissions currently pending before CLCS cannot be considered by CLCS because one or more neighboring States have invoked the existence of a delimitation dispute to withhold their consent under Paragraph 5 (a). He evaluates this number seventeen as considerable⁽¹³⁶⁾. In this regard it should be noted that a party State to a dispute with a coastal State does not necessarily invoke Paragraph 5 (a)⁽¹³⁷⁾. In other words, there is not coherency in invocation of the provision⁽¹³⁸⁾. If this is the case, practical consideration of the legal interests to be influenced by the CLCS procedures would be meaningful⁽¹³⁹⁾. Such a practical consideration may bring a different definition of the legal interests from a categorical definition of the legal interests of party States to delimitation, land and maritime disputes under Paragraph 5 (a)⁽¹⁴⁰⁾.

In reality, in what factual situation, would other States be influenced by the

(136) Oude Elferink, *op. cit.*, *supra* n. 132, pp. 302, 307.

(137) Regarding the French submission, although Vanuatu has competing claims over some islands with France, it did not invoke Paragraph 5 (a) when it submitted its observation. Letter from Vanuatu, 11 July 2007, http://www.un.org/depts/los/clcs_new/submissions_files/fra07/van_0701306.pdf.

(138) As mentioned above (*supra* n. 112), while the Netherlands invoked Paragraph 5 (a) in submitting its observation in relation to the Australian submission, other States that also issue their observations in relation to the Australian submission did not follow this example.

(139) As for such practical consideration, for instance, Nishimura, *op. cit.*, *supra* n. 134,

(140) A practical consideration of influence that CLCS recommendations may cause would raise an issue regarding whether not only legal interests but also non-legal interests of third States should be protected. As mentioned below, the disputes that Paragraph 5 (a) provides for are not necessarily confined to legal disputes. If this is the case, the interests of third States to be protected may include non-legal interests. In any way, without clearly defining both the interests to be protected and the disputes under the provision, the CLCS function would be hampered by invocation of the provision without appropriately definite grounds. In this regard, it is questioned whether just “a claim” over the sea-bed can form a legal interest or even a non-legal interest to be protected. Concerning this point, see, Lando, *op. cit.*, *supra* n. 37, para. 6.

CLCS procedures⁽¹⁴¹⁾? In the 2012 Nicaragua v. Colombia Case, Colombia maintained that “in present case, Nicaragua ‘requests a continental shelf delimitation between opposite coasts,’ which cannot be done without first identifying the extent, or limit, of each State’s shelf entitlement.” According to this position, the relationship between the issue of the entitlement to OCS and delineation, on the one hand, and the issue of the delimitation of OCS, on the other hand, would depend on whether the coasts of the party States to the delimitation dispute are adjacent or opposite⁽¹⁴²⁾. The meaning of “prejudice” in Article 9 of Annex II to UNCLOS and Paragraph 5 (a) of Annex I to ROP need to be carefully determined by such practical consideration of factual situations relating to each submission to CLCS⁽¹⁴³⁾.

In addition, even if it is burdensome on CLCS to decide the existence of a dispute, categorical denial of its ability to do so is not convincing. The members of CLCS are scientists and not legal experts⁽¹⁴⁴⁾, so they are not likely to be accustomed to the determination of the existence of a dispute, particularly a legal dispute. However, recalling the fact that, for instance, Chapter 6 of the United Nations Charter presupposes a decision by the Security Council, a political organ, of the existence of a particular type of dispute under the provision⁽¹⁴⁵⁾, CLCS’s ability to decide an existence of a dispute should not be categorically denied. It should be also added that the delimitation, and land and maritime disputes under Paragraph 5 (a) are not necessarily “legal” disputes that judges and lawyers are accustomed to dealing with⁽¹⁴⁶⁾. At least, the nature

(141) This question can be asked by a different formulation: what kinds of disputes have impacts on decisions of limits of OCS? For instance, disputes concerning baselines and interpretation of Article 76 have influence on the decisions. Oude Elferink, *op. cit.*, *supra* n. 62, p. 268.

(142) *Supra* n 9.

(143) Concerning an interpretation of these provisions, see, Oude Elferink, *op. cit.*, *supra* n. 132, pp. 312–322.

(144) Concerning this point, see, Nelson, *op. cit.*, *supra* n. 21.

(145) Article 34 of the United Nations Charter.

of those disputes needs to be argued. The meaning of land disputes and delimitation disputes is relatively easy to identify. In comparison, the meaning of maritime disputes is indefinite⁽¹⁴⁷⁾. That would hamper the function of CLCS. This is because other States have a wide possibility to invoke Paragraph 5 (a) by claiming an existence of a maritime dispute so as to prevent CLCS from considering submissions from coastal States.

Furthermore, it is true that some land disputes require a long time to be resolved, and due to Paragraph 5 (a), the recommendation by CLCS would delay for such a long time. Without consent from a party State to a land dispute with a coastal State, CLCS needs to defer its recommendation on the submission from the coastal State until the land dispute is resolved. However, there are inherent reasons for land disputes to take a long time to be finally resolved. If CLCS is to render recommendations even with influence upon the legal interests of party States to a land dispute with a coastal State that submits information to CLCS, there needs to be justifications for such influence. Why is “encroachment” on the legal interest of the party States to a land dispute with a coastal State is permitted? Why is there “supremacy” of the CLCS function to render a recommendation and the delineation of OCS by the coastal State on the basis of the recommendation over the protection of the legal interest? It is certain that a coastal State can proceed to exploitation of natural resources on its OCS with an opposable OCS limit set on the basis of recommendations from CLCS. Economic utility realized by exploiting the natural resources on OCS might form one of the justifications for CLCS to issue its recommendations when facing an existence of a land dispute, but it is not enough.

Third, turning to possible amendments to Paragraph 5 (a), above all the characteristic of the CLCS procedures should be discussed and recognized⁽¹⁴⁸⁾.

(146) McDorman, *op. cit.*, *supra* n.104, p. 293.

(147) Concerning this point, see, *supra* n. 135.

While under the existing documents, they have a bilateral nature between a coastal State and CLCS. There may be possibilities to build multilateral procedures of CLCS with the involvement of other States. In addition, CLCS may be either an implementation organ of UNCLOS or a dispute settlement organ⁽¹⁴⁹⁾. Anyway, without proposing a desirable sketch of the CLCS procedures as a presupposition, arguments of amendments to Paragraph 5 (a) would not be productive.

If the CLCS procedures should keep their bilateral nature, CLCS must refrain from exercising influence on States other than a coastal State that submits information to CLCS. The judicial procedures in ICJ also have a bilateral nature emerging between two disputing States. It has the intervention procedure⁽¹⁵⁰⁾ to protect third States⁽¹⁵¹⁾. Considering this in the CLCS procedures, the taking up and consideration of observations from other States may fulfill a similar function to the intervention procedure of ICJ. The States whose legal interests are affected may be allowed to submit observations to CLCS. However, “the affected States” by the recommendations of CLCS need to be prudently examined by sufficiently considering the actual influence of the recommendations of CLCS on other States⁽¹⁵²⁾. Based upon these examinations, Paragraph 5 (a) may be properly amended. Such amendment from a practical

(148) As a thorough examination of the role and function of CLCS, H. Sakai, “Kokuren Kaiyoho Joyaku ni Okeru Tairikudana Genkaiinkai (CLCS) no Yakuwari to Kino (The Role and Function of CLCS under UNCLOS),” in Matsui *et al* eds., *Agendas in the 21st Century of International Law and the Law of the Sea*, 2016, Toshindo, p. 376 *et seq.*

(149) Concerning this point, see, *supra* n. 121.

(150) Article 62 and Article 63 of the ICJ Statute provide for two types of interventions.

(151) A. Kanehara, “Soshō Sank Yoken toshiteno ‘Eikyo wo Ukeru’ Hoteki Rieki (“An Interest of a Legal Nature Which May Be Affected by the Decision in the Case” as a Requirement for Intervention before International Court of Justice),” 50 *Rikkyo Hogaki (St. Paul’s Review of Law and Politics)*, 1998, p. 141 *et seq.*

(152) ICJ has taken very prudent position to admit the intervention of a third State in accordance with Article 62 of the ICJ Statute. *Ibid.*, pp. 147–157.

perspective would reduce the “impasse” caused by the existence of such disputes as being provided for under current Paragraph 5 (a), at least, to a certain degree.

When rebuilding the CLCS procedures, it is necessary to have a holistic point of view to utilize not only CLCS but also others including judicial and arbitral procedures that may deal with the legal effect of the delineation of OCS.

Fourth, as of now, there is Paragraph 5 (a) to limit the CLCS function. The difficulty is pointed out for CLCS to decide the existence of a dispute. Under this situation, there may be a practical solution to avoid the “impasse” on the CLCS function caused by the difficulty⁽¹⁵³⁾. When CLCS faces the difficulty, CLCS may presuppose that a submission from a coastal State does not involve any disputes⁽¹⁵⁴⁾ so as to proceed to the consideration of the submission⁽¹⁵⁵⁾. If CLCS is not informed of a dispute by a submitting State and other States, it has no reason to take into account a dispute situation⁽¹⁵⁶⁾. If CLCS comes to be wrong, which means, if there is an actual dispute between the coastal State and other States, the party State to the dispute with a coastal State could protest the limit set by the coastal State even on the basis of the recommendations of CLCS. Other States can request such remedies at appropriate fora rather than CLCS.

(153) This difficulty can be caused also by the indefinite meaning of maritime disputes.

(154) According to Paragraph 2 (a) of Annex I to ROP, in cases there is a dispute, CLCS should be informed of such dispute by the coastal States making the submission. Therefore, if coastal States do not inform CLCS of dispute, CLCS may presuppose that there is not a dispute.

(155) By recognizing this possibility, the power of the “veto” that other States can exercise to prevent CLCS from functioning would be, at least, mitigated. Concerning the “veto” of third States, Oude Elferink, *op. cit.*, *supra* n. 132, p. 319. Compared to the situation of the difficulty to decide the existence of a dispute, in cases of the obvious existence of the disputes under Paragraph 5 (a), a party State to the disputes can prevent CLCS from functioning by invoking the provision. It is not easy to think any alleviation of the prevention of the CLCS function. Nonetheless, according to the examination above in taking up the land dispute situation, the author of this paper would not use the term “veto” with a totally negative connotation.

(156) Gau, *op. cit.*, *supra* n. 98, p. 64.

In order for such a solution to be realized, this paper interprets “final and binding” under Article 76, Paragraph 8 as the chance of opposability. Even when a limit of OCS is set by a coastal State on the basis of the recommendations from CLCS, other States are allowed to dispute the limit. Unless other States approve or acquiesce, the limit cannot become final and binding in relation to the other States.

There is still an “impasse” on the CLCS function caused by a definite existence of a dispute that Paragraph 5 (a) provides for. In addition to the examination above in taking up the land dispute situation, only what can be said to such a situation is that it is not adequate to downplay too much a value and significance of the dispute settlement procedures under international law ⁽¹⁵⁷⁾.

Concluding Remarks

The entitlement to CS and OCS raises a very important issue for international law to maintain its validity ⁽¹⁵⁸⁾. This is because under the law of

(157) In the Symposium mentioned at the beginning of this paper, Mr. Lawrence Martin suggested the following point. Under Article 298, delimitation disputes may be exempted from dispute settlement procedures that render a legally binding decision. If a State who is a party to a delimitation dispute with a coastal State decides to make use of this exemption, the delimitation dispute cannot be resolved by such procedures. As a result, the situation would take place that CLCS cannot ever issue recommendations on the submission of the coastal State even. This observation is not adequately convincing. The other State needs or wants to dispute the delimitation with the coastal State. Therefore, although it is not certain whether the other State chooses the judicial or arbitral procedures, it likely uses some dispute settlement procedures including those established under UNCLOS. For the same reason, the examination of Article 298 by Oude Elferink is not necessarily convincing. He points out that as a result of Article 298 there would be the prolonged absence of a boundary. Oude Elferink, *op. cit., supra* n. 132, p. 311. An expectation on negotiation and other dispute settlement procedures is not categorically denied.

(158) From a similar perspective of the validity of international law, historic rights must require to be examined. International law incessantly has to cope with both historical and newly emerging phenomena in order to keep its validity over the various phenomena. Kanehara, *op. cit., supra* n. 19.

the sea, it is one of the most solid principles that the land dominates the sea, and the entitlement both to CS and OCS is able to be based upon this principle. Irrespective of really frequent citations of the principle, or, it might be called a maxim, the legal status or even extra-legal status of the principle has not been clearly established. Furthermore, the ramifications from the assertion that the entitlement to CS and OCS is based upon the principle have not been analyzed in a definite manner. As a result, the entitlement to CS and OCS has the possibility to be excluded from international regulation and the international legal order, if it is grounded in an extra-legal principle.

Regarding OCS, depending on a party-State or a non-party State to UNCLOS, this issue requires different examinations⁽¹⁵⁹⁾. With respect to the entitlement to OCS of a party State, a precise understanding of the ramifications of the “inherency” of the entitlement to OCS is critical. Due to the inherency, a party State may keep the entitlement to OCS under Article 76, Paragraph 1 of UNCLOS without opposable limits of its OCS. After it establishes the limit of its OCS on the basis of the recommendations from CLCS, the limit acquires a chance of opposability, and the entitlement to OCS up to the limits also becomes able to be opposable in relation to other States that do not stage protest against the limits.

In comparison, for a non-party State to UNCLOS, the issue of the entitlement to OCS raises more complicated logical situation than in cases of the entitlement to OCS of a party State. The entitlement to OCS of a non-party State is likely to be based upon the “inherency” and upon the principle that the land dominates the sea. The concept of natural prolongation reflects the principle in the case of OCS. In order to deny such a claim of the entitlement to OCS, one possibility is to find a basis for the entitlement in a customary rule reflected in

(159) For this reason, in this paper, the issue was dealt with by dividing in Section 3 for a party State and Section 4 for a non-party State.

Article 76, Paragraph 1 of UNCLOS. However, in that case, by picking up solely Paragraph 1, the legal regime of OCS that UNCLOS tries to build including all the paragraphs of Article 76 and other relevant provisions would be destroyed.

To reject the exclusion of the entitlement to OCS from the international legal order, and also to prevent a destructive argument to the legal regime of OCS under UNCLOS, it is critical to grasp all the relevant provisions of UNCLOS concerning OCS so as to recognize a legal regime of OCS. As an essential part of the regime, CLCS takes a critical role by accepting and considering submissions from a non-party State to UNCLOS. This is a desirable “spillover” of UNCLOS, international law, toward non-party States thereto. Thus, CLCS fulfills a function to implement the legal regime of OCS, and also to contribute to the development of the international legal order of the oceans.

CLCS, however, is not omnipotent. Too much expectation on it would be rather damaging to its function, particularly from a practical point of view regarding its limited budget and membership. Under this reality, in order to enable CLCS to function to a full extent, the appropriate limitation needs to be set on its function. In particular the involvement of States other than coastal States that submit information to CLCS must be appropriately restricted. Such a restriction is derived from the fundamental understanding of the bilateral nature of the CLCS procedures. In this context, although interpretative and practical problems remain, Paragraph 5 (a) of Annex I to ROP may have its *raison d’être* ⁽¹⁶⁰⁾.

Significance is not deniable in the analysis of a possible amendment of the existing provisions of UNCLOS and other relevant documents in order for

(160) As a positive aspect of Paragraph 5 (a) and Rule 46, it is pointed out that States are willing to resolve a maritime delimitation dispute or agreeing, and thus, fostering good will, to consent for CLCS to work and deal with the consequences later. McDorman, *op. cit.*, *supra* n. 104, p. 301.

avoiding the arguable “impasse” on the CLCS function. The important point is, in conducting such an examination, not only the nature of CLCS procedures but also the expected functions of other implementation and dispute settlement mechanisms should be considered from a holistic viewpoint.

By widening the function of CLCS in order to contribute to the international legal order of the oceans and by securing the proper function of CLCS, it can really realize the object and purpose of UNCLOS ⁽¹⁶¹⁾.

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(161) As the object and purpose of UNCLOS, it is required to emphasize maintenance of its legal order on OCS and promotion of development in exploitation of natural resources on it.