FUNDAMENTAL PRINCIPLE OF “WITHOUT PREJUDICE” IN SUBMISSIONS TO THE UN CLCS IN NORTHEAST AND SOUTHEAST ASIA

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Fundamental Principle of “Without Prejudice” in the CLCS Work

The UN Commission on the Limits of the Continental Shelf (CLCS) is an international treaty body formed pursuant to Annex II of the 1982 UN Convention on the Law of the Sea (hereinafter UNCLOS), and composed of 21 technical - not legal, but...
technical - experts in the fields of geology, geophysics or hydrography, whose function is to consider the data submitted by coastal States concerning the outer limits of their continental shelf beyond 200 nautical miles, the so-called Outer Continental Shelf, and to make Recommendations on those limits in accordance with UNCLOS Article 76 and the CLCS Rules of Procedure.  

Due to its fundamental obligation not to prejudice any disputes – or more broadly any matters – concerning maritime boundaries and other related issues, the CLCS’ consideration of the large number of sixty Submissions presented so far, and its hosting of some forty more Preliminary Submissions (Information) of coastal states – and numerous pertaining Notes Verbales of other states concerned – on the limits of their outer continental shelves beyond 200 nautical miles, is like a “United Nations Laboratory.” This circumstance has been importantly stimulating future resolutions by means of bilateral (sometimes trilateral) negotiations of treaties and/or submitting of disputes to the International Court of Justice (ICJ) and other judicial and arbitral fora.  

The Preliminary Submissions are not formally considered by the CLCS, but they were allowed as means of overcoming financial constraints of developing states in meeting the CLCS deadline. These Preliminary Submissions can also occasionally be used as means for testing reactions- prior to actual Submissions - by other states to disputed claims. For example, three Preliminary Partial Submissions were filed in 2009: by France on its islands of Saint Pierre and Miquelon off the Canadian coast, which perhaps should not have any outer continental shelf at all; by China on the East China Sea disputed with Japan and South Korea; and by Mauritius on the Chagos Archipelago disputed with Britain.  

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3According to the 18th SPLOS Decision, UN Doc. SPLOS/183 (20 June 2008), Preliminary Information indicative of the outer CS (referred to hereinafter for reasons of practical convenience as “Preliminary Submission”) may satisfy the deadline requirements under Article 4 of UNCLOS Annex II and SPLOS/72.
The fundamental duty of coastal states and the CLCS with respect to the determination of the continental shelf limits without affecting boundary delimitation is expressly laid down in UNCLOS Article 76(10) providing that:

The provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts.”

While not expressly formulated in UNCLOS, a similar principle has also evolved in customary international law with respect to UNCLOS Article 121 on Regime of Islands as follows:

The provisions of Article 121, including its paragraph 3 applying to the so-called Rocks, are without prejudice to the questions relating to unresolved disputes concerning sovereignty over insular territory and to the delimitation of maritime zones of islands between States with opposite or adjacent coasts pursuant to UNCLOS Articles 15, 74 and 83. 4

Okinotorishima, which is included in Japan’s Submission to the CLCS, forms a single exception in that - as is discussed further below - it keeps being protested by China and South Korea for reasons not related to delimitation but to its nature as potential Article 121(3) rock. Otherwise, the issue of eventual application of the rocks-principle under Article 121(3) does not arise in practice, unless in the context of specific territorial and maritime delimitation disputes.

In view of the significance of maritime boundary delimitations for "permanent" determination of the "final and binding" outer limits of the continental shelf, the principle of Article 76(10) that this determination is without prejudice to the delimitation of the continental shelf, as mirrored by Article 134(4) and the customary law based principle

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applying to Article 121 quoted above, is further reinforced by Article 9 of the UNCLOS Annex II and the famous Rule 46 of the CLCS Rules of Procedure and its corresponding Annex I on “Submissions in Case of a Dispute Between States with Opposite or Adjacent Coasts or in Other Cases of Unresolved Land or Maritime Disputes.”

Of those provisions, only CLCS Rule 46 refers to disputes. This means that:

* under UNCLOS Article 76(10) and Article 9 of UNCLOS Annex II and the CLCS Rule 46, the determination of the outer continental shelf must be without prejudice to boundary delimitations of the outer continental shelf generally.

But that:

* under CLCS Rule 46 and its Annex I, this determination must in addition be without prejudice to disputes over such boundary delimitations and to other cases of unresolved land or maritime disputes.

The question arises whether this means that CLCS Rule 46 expands intentions of the UNCLOS to disputes. The answer is no, it does not. Although UNCLOS Article 76(10) and Article 9 of UNCLOS Annex II do not expressly refer to disputes, they clearly imply that outer continental shelf determination must be without prejudice to both disputed and undisputed boundaries and related matters.

It may also be noted that UNCLOS Article 76(10) and other provisions referred to above, are what the Virginia Commentary calls “savings provisions for all questions” regarding continental shelf delimitation, in which the CLCS must not get involved itself. It must determine the limits of outer continental shelf beyond 200 nautical miles, but it must not effect any delimitations between two or more states. This is echoed by United States Fact Sheet on Outer Continental Shelf stating that: “The CLCS has no mandate to settle boundary disputes, nor can it make any decisions that will bias future resolution to such disputes. Any boundary disagreements must be resolved between the States themselves.”

5 Virginia Commentary, supra note 4, Vol. II (Martinus Nijhoff 1993), pp. 837-890: UNCLOS Article 76, at p. 883: UNCLOS Article 76(10), also noting at pp. 848-853 that the wording of Article 76(10) remained the same in the 1975 U.S. and Evensen Group’s proposals, the 1976 proposal of Ireland, which drew on elements from the U.S. and Evensen’s texts, and in all other ensuing drafts until their inclusion into UNCLOS; pp.1000-1018: UNCLOS Annex II; p.1017: Article 9 of UNCLOS Annex II; pp. 1023-1025: UNCLOS III Final Act’s Annex II; and Vol. VI (Martinus Nijhoff 2002), pp. 85-86: UNCLOS Article 134(4).

The wording of UNCLOS Article 76(10), CLCS Rule 46 and other “savings provisions” mentioned before, leave no doubt that the CLCS - as a technical and not judicial body - must not prejudice determination of both disputed and undisputed maritime boundaries, and that this determination can be effected at any time through the consent-based procedures - of states’ own choice or compulsory - of dispute settlement pursuant to UNCLOS Part XV. The basic rationale of such practice stems from the fundamental rule that: “The delimitation of sea areas has always an international aspect” and, thus, cannot be established unilaterally, but must be effected by states jointly or by judicial/arbitral fora concerned.\footnote{There is nowhere in the UNCLOS or CLCS Rules any indication in support of the misconceived suggestion made by Faroes Legal Adviser Mr. Kunoy in 2010 (and opposed by this author in 2011), that the ICJ or any other courts cannot assume jurisdiction over delimitation of the outer continental shelf beyond 200 nautical miles, until after this outer shelf was first determined by the CLCS. To the contrary, the wording of all the respective “savings provisions” and their interpretation by the *Virginia Commentary*, as well as vast state practice of filing Submissions with the CLCS, seem to be clear in suggesting that, as confirmed in the 2006 UNCLOS Annex VII Barbados/Trinidad & Tobago (*Jurisdiction and Merits*) Award, and the 2012 ITLOS Bangladesh *v. Myanmar Bay of Bengal Maritime Delimitation* Judgment, the CLCS’ determination must in no way encroach upon existing and future delimitations, nor must it prejudice other land or maritime disputes, which can thus well be adjudicated-arbitrated or otherwise resolved.

Should the ICJ, any other court, or even states themselves, proceed to delimit the outer continental shelf beyond 200 nautical miles prior to the CLCS determination, the CLCS review - notwithstanding whether such boundaries do or do not border on the International Seabed Area - will be limited to being informed about or to using such boundary lines, as the CLCS did with lines of the 2000 Mexico/USA Treaty in its 2009 Recommendations on the Western Gulf of Mexico Submission.

The CLCS Rule 46 and all provisions of its Annex I are being applied in practice by the CLCS, both to disputed and non-disputed boundary delimitations, and within compatible implementation of the fundamental principle laid down in UNCLOS Article 76(10) quoted above. Coastal states are obliged to assure the CLCS that the Submission will not prejudice matters relating to the delimitation of boundaries between States.

One of the possible forms of these assurances is to make only a Partial Submission excluding the disputed part of the outer continental shelf beyond 200 nautical miles, as provided for in paragraph 3 of Annex I of the CLCS Rules of Procedure.

These Partial Submissions demonstrate that the ICJ or other courts (or coastal states themselves) are thus competent to effect delimitation of the outer continental shelf in areas which are excluded from this Partial Submission and are thus not subject to the CLCS determination. Such exclusion can be directly effected by the coastal states concerned. For example, as is further discussed below, China made at first only a 2009 Preliminary Partial Submission (East China Sea), and the Philippines only a 2009 Partial (Benham Rise) Submission, which both envisaged their further Partial Submissions on the hotly disputed South China Sea involving Spratly and Paracel Rocks, covered so far by controversial Submissions of Vietnam and Malaysia.

Nicaragua’s 2010 Preliminary Partial Submission stated that it will consider further determination of the outer continental shelf beyond 200 nautical miles in the southwestern part of the Caribbean Sea only after - not as Mr. Kunoy suggests before, but after - the ICJ has rendered its *Nicaragua v. Colombia Territorial and Maritime Dispute (Merits)* Judgment in the future. The same effect was implied by Peru’s 2010 Note Verbale on Chile’s Preliminary Submission in the context of the pending ICJ *Peru v. Chile Maritime Delimitation* case.

Alternatively, exclusion of the disputed and/or not yet delimited areas from the CLCS consideration can occur as a result of protests of other states parties to such disputes/delimitations. For instance, France’s 2007 Partial Submission (French Guyana and New Caledonia), requested the CLCS – only as a result of Vanuatu’s protest – to exclude from the CLCS’ consideration the region involving Hunter and Matthew rocks disputed by France with Vanuatu.

Another possibilities of assuring that a Submission will not prejudice disputed or undisputed maritime delimitations or other unresolved land or maritime disputes include:

* non-consideration (deferral) of a Submission,

* or consideration of a Submission with prior consent of all parties to such pending delimitations and disputes, as provided for by paragraphs 5 and 6 of Annex I to the CLCS Rule 46.

As is further discussed below, Japan filed its 2008 Submission upon consent of both the United States and Palau with respect to not prejudicing Japan/U.S. Northern Marianas and
Japan (Okinotorishima)/Palau maritime delimitations, respectively, and the ensuing 2009 Palau’s Submission specified that it did not prejudice bilateral maritime delimitations between Palau and Japan, Indonesia, Philippines and Micronesia.

The preliminary and actual Submissions of ECOWAS member states – Nigeria, Ghana, Côte d’Ivoire, Benin and Togo – and their accompanying Notes Verbales, were all filed pursuant to the ECOWAS Understanding of their “no objection” (a prior consent) to the CLCS making its Recommendations on their Submissions without prejudice to the prospective delimitations of these states in the Gulf of Guinea. Such prospective delimitations of the Gulf of Guinea/ECOWAS and other West and East African states – whether disputed or undisputed – are all qualified in their Submissions as disputes falling within the ambit of Rule 46 and Annex I of the CLCS Rules of Procedure.

Similarly, the Caribbean practice – also occurring in South and Southeast Asia and elsewhere – illustrates that, notwithstanding alleged Absence of Disputes (as claimed in their Submissions), coastal states feel obliged – for as long as their disputed and undisputed maritime delimitations or other land or maritime disputes are pending – to obtain prior consent of other states concerned for the purpose of their Submissions.

If a maritime delimitation or other dispute was already resolved before a particular Submission was filed with the CLCS, consent of another party is not being sought for the purposes of that Submission. For example, Mexico did not seek prior consent of the United States for its 2007 Partial (Western Gulf of Mexico) Submission, because this Submission was preceded by the 2000 Mexico/USA Treaty. Barbados, on the other hand, did not seek prior consent of Trinidad & Tobago for its 2008 Submission, because this Barbadian Submission was preceded by the UNCLOS Annex VII Barbados/Trinidad & Tobago (Jurisdiction and Merits) Award.10

In the case of Submissions in the Bay of Bengal, Bangladesh was not asked for a prior consent and, therefore, it protested against the 2008 Submission of Myanmar and the 2009 Partial (Bay of Bengal-Arabian Sea) Submission of India, which were both made without prejudice to their outstanding maritime delimitations, even though neither Myanmar nor India admitted existence of any disputes between them and other states. By means of its two Applications, Bangladesh then instituted two UNCLOS Annex VII Bay of Bengal Arbitrations against Myanmar and India, of which Bangladesh v. Myanmar was rechanneled

in 2010 to the ITLOS as its inaugural maritime delimitation case. In its ensuing 2011 Submission, Bangladesh assured the CLCS that this Submission covered the overlapping areas of the shelf beyond 200 nautical miles, but was without prejudice to any matters forming the subject of the parallel Annex VII Bangladesh v. India and ITLOS Bangladesh v. Myanmar proceedings. However, Myanmar’s Note Verbale protested Bangladesh’s Submission on the ground that Bangladesh has no shelf beyond 200 nautical miles, not even any shelf up to 200 nautical miles. It remains to be seen whether the CLCS will wait for this Annex VII case being resolved first and if it will only issue thereafter its Recommendations on Submissions of Myanmar (2008), India (2009) and Bangladesh (2011).\(^\text{11}\) The 2012 ITLOS Bangladesh v. Myanmar Bay of Bengal Maritime Delimitation Judgment reaffirmed in any event the approach of the UNCLOS Annex VII Barbados/Trinidad & Tobago (Jurisdiction and Merits) 2006 Award of upholding jurisdiction over the delimitation of the outer continental shelf beyond 200 nautical miles notwithstanding then still pending Submissions of the parties to the CLCS. [Editorial Note: there is no consistency in the reference to 2006 UNCLOS...placing the date before the acronym is misleading].

Alternatively to Partial Submissions excluding disputed areas and/or to full-fledged Submissions covering disputed areas subject to consent of all states concerned, two or more coastal states can agree to make Joint or Separate Submissions, according to paragraph 4 of the CLCS Annexe I [Editorial Note: splitting verb formats is extremely confusing for the reader]. The 2002 Seychelles/Tanzania EEZ-CS Delimitation Agreement was supplemented by their 2011 Memorandum of Understanding spelling out a no prejudice to each of their Submissions (of 2009 and 2012), pursuant to UNCLOS Article 76(10), in areas where there could be potential overlaps.

An interesting variation of such Agreement was provided by the 2006 Denmark (Faroes)/Iceland/Norway Interim Outer Continental Shelf Agreement, which provisionally delimited their shelves beyond 200 nautical miles in the Northeast Atlantic’s Southern Banana Hole, subject to the future confirmation and adjustment of these claims by the CLCS Recommendations.\(^\text{12}\) It appears that it was this Southern Banana Hole practice that most


likely inspired the Faroese Legal Adviser to searching for arguments against upholding, by the ICJ or other courts, of jurisdiction over the outer continental shelf delimitation prior to issuing by the CLCS of its Recommendations. However, while the coastal states of the Southern Banana Hole were of course welcomed to withhold their outer continental shelf delimitations until after the CLCS issued its Recommendations, this – as was stated earlier – cannot be extended to denying jurisdiction of the ICJ or other courts (such as was the UNCLOS Barbados/Trinidad & Tobago Arbitral Tribunal and the ITLOS in Bangladesh v. Myanmar Bay of Bengal case), until after the CLCS completed its work; the judicial/arbitral settlements or direct negotiations leading to treaties can indeed take place prior, in parallel, or sometimes in a follow-up, to the CLCS’ involvement.

Northeast and East Asia - China, Japan, Republic of Korea

From amongst East Asian developing states, only China and the Republic of Korea filed Preliminary Submissions of 11 May 2009 with the CLCS, each of which Submissions was protested by Japan in two (identical) Notes Verbales of 23 July 2009. By mid-2012, a China/Republic of Korea Joint Submission to the CLCS was reportedly under preparation with a view to countering Japan's growing maritime assertiveness. The Republic of Korea has been involved in a dispute with Japan over Takeshima/Tok-do (Liancourt) Rocks and a dispute with China over Ieodo/Suyan (Socotra) Rock. China has been involved in a dispute with Japan over Senkaku/Diaoyu (Fishing or Pinnacle) Islands. Japan, on its part, filed its actual Submission on 12 November 2008, which was questioned in unusual protests by China and the Republic of Korea on account of Japan’s use of Okinotorishima. All the islands involved in these disputes potentially fall within an ambit of the rocks-principle as set out in UNCLOS Article 121(3).

The Republic of Korea’s 2009 Preliminary Partial (East China Sea) Submission was confined only to a part of the outer CS limits within the 1974 Japan/Korea Joint Development Zone (JDZ) located out to the Okinawa Trough and it was consulted by Korea with both China and Japan, in parallel to their ongoing negotiations on maritime boundary delimitations in this region. Korea’s Submission assured the UN Secretary-General, as well as China and Japan that this Submission was consistent with UNCLOS Article 76(10) by stating that “without prejudice to the question of delimitation of the continental shelf in the East China Sea, and is without prejudice to any agreement between Korea and any other State as well as the rights of any State not party to any such agreement.”

13 See supra note 8.
14 See supra note 9.
15 On the intimate relationship between UNCLOS Article 121(3) and maritime boundary delimitation, see our proposed Article 121(4) supra note 4; infra notes 45, 50.
Japan’s Note Verbale of 23 July 2009 reserved its right to make additional comments on the Republic of Korea’s position in the future and it meanwhile stressed that:

It is indisputable that the establishment of the outer limits of the continental shelf beyond 200 miles in an area comprising less than 400 miles and subject to the delimitation of the continental shelf between the States concerned cannot be accomplished under the provisions of the UNCLOS.

This passage implies that were the Republic of Korea and/or China to proceed with a Partial (East China Sea) Submission, Japan would request the CLCS to refrain from making Recommendations on such a Submission.¹⁷

The implementation of the 1974 Japan/Republic of Korea JDZ and accompanying Continental Shelf Agreements (ending the delimitation where the Rocks begin to influence the equidistance line) has been complicated by the longstanding dispute over two tiny, uninhabited Takeshima/Tok-do (Liancourt) Rocks (151 meters apart) of a combined area of 0.23 square kilometers and 168.5 meters height, which are covered by Japan’s straight baselines (Point 79 not conforming with UNCLOS),¹⁸ and lie midway from the fish/oil-rich East China Sea/Sea of Japan (50 miles east of the Korean Ullung-do and 90 miles the north-west of the Japanese Oki Islands), and which serve as a fishing station, have a territorial post erected by the Japanese Coast Guard in 1953, a lighthouse and a helicopter landing pad built in 1954 by Korea, which also built there a wharf in 1996. The Republic of Korea has, moreover, kept on Liancourt Rocks some 50 Korean marine police (since President Rhee’s 1952 “Peace Line” Declaration), declared the Rocks “a nature monument” in 2002, and installed there the first private Korea Telecom line in 2005. The number of visitors at Takeshima/Tok-do has increased from 1,673 in 2004 to 40,000 in 2005.¹⁹ After certain discussions on using Takeshima as a basepoint, see S. Oda and H. Owada, “Annual Review of Japanese Practice - Japan’s Note Verbale of 23 July 2009 on Korea’s 2009 Preliminary (East China Sea) Submission. For Japan’s 15 “groupings” of straight baselines under the 1977 Law No. 30 on the Territorial Sea and Contiguous Zone as Amended by the 1996 Law No.73, which cover 162 segments, of which 28 per cent exceeds the 24-mile maximum segment length, including over 10 per cent of segments longer than 48 miles, such as 57-mile segment between Point B and Takeshima/Tok-do Point 79 (Group 9), where there is no "fringe of islands along the coast in its immediate vicinity" required by UNCLOS Article 7(1), see Limits in the Seas No.120 - Japan at 7-8 (1998), available at http://www.state.gov/e/oes/ocs/c16065.htm. For parliamentary discussions on using Takeshima as a basepoint, see S. Oda and H. Owada, “Annual Review of Japanese Practice (1976-1977),” (1985) 28 Japanese Annual of International Law (JAIL) 59, 132-134. On enclosure under South Korea’s 1977 Law on Territorial Sea and Contiguous Zone as Amended by the 1995 Law and the 1978 TS/CZ Enforcement Decree as Amended by the 1996 Decree, of all the islands and rocks off the southern and western coasts – except large inhabited Cheju-do, see at http://en.wikipedia.org/wiki/Cheju-do – by South Korea's excessive straight baselines (Points 6-18, ranging from 12 to 29 miles distant from the mainland and exceeding the maximum 24-mile segment length), see Limits in the Seas No.121 - South Korea, at 4-6, including Map (1998), available at http://www.state.gov/e/oes/ocs/c16065.htm; J.A. Roach and R.W. Smith, “Straight Baselines: The Need for a Universally Applied Norm,” (2000) 31 ODIL 47, 61-62, and Map at 79, noting that in its reply to the U.S. protest, South Korea considered that its baselines conform to the UNCLOS Article 7 as they do not depart to an appreciable extent from the general direction of the coastline; Van Dyke (2003), supra note 4, at 517, noting objections raised by China and Japan with respect to the legality of South Korean baselines; Van Dyke (2007), supra note 4.

¹⁷ Id., Japan’s Note Verbale of 23 July 2009 on Korea’s 2009 Preliminary (East China Sea) Submission.

¹⁸ For Japan’s 15 “groupings” of straight baselines under the 1977 Law No. 30 on the Territorial Sea and Contiguous Zone as Amended by the 1996 Law No.73, which cover 162 segments, of which 28 per cent exceeds the 24-mile maximum segment length, including over 10 per cent of segments longer than 48 miles, such as 57-mile segment between Point B and Takeshima/Tok-do Point 79 (Group 9), where there is no "fringe of islands along the coast in its immediate vicinity" required by UNCLOS Article 7(1), see Limits in the Seas No.120 - Japan at 7-8 (1998), available at http://www.state.gov/e/oes/ocs/c16065.htm. For parliamentary discussions on using Takeshima as a basepoint, see S. Oda and H. Owada, “Annual Review of Japanese Practice (1976-1977),” (1985) 28 Japanese Annual of International Law (JAIL) 59, 132-134. On enclosure under South Korea’s 1977 Law on Territorial Sea and Contiguous Zone as Amended by the 1995 Law and the 1978 TS/CZ Enforcement Decree as Amended by the 1996 Decree, of all the islands and rocks off the southern and western coasts – except large inhabited Cheju-do, see at http://en.wikipedia.org/wiki/Cheju-do – by South Korea's excessive straight baselines (Points 6-18, ranging from 12 to 29 miles distant from the mainland and exceeding the maximum 24-mile segment length), see Limits in the Seas No.121 - South Korea, at 4-6, including Map (1998), available at http://www.state.gov/e/oes/ocs/c16065.htm; J.A. Roach and R.W. Smith, “Straight Baselines: The Need for a Universally Applied Norm,” (2000) 31 ODIL 47, 61-62, and Map at 79, noting that in its reply to the U.S. protest, South Korea considered that its baselines conform to the UNCLOS Article 7 as they do not depart to an appreciable extent from the general direction of the coastline; Van Dyke (2003), supra note 4, at 517, noting objections raised by China and Japan with respect to the legality of South Korean baselines; Van Dyke (2007), supra note 4.

¹⁹ Liancourt Rocks, see http://en.wikipedia.org/wiki/Liancourt_Rocks, noting that while over 900 Korean and 2,000 Japanese citizens list Takeshima/Tok-do as their residence, only two people (a married Korean couple) are


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inconclusive attempts at reaching a resolution in mid-2006, the rocky outcrops of Takeshima/Tokdo (Liancourt) have stirred revived controversies in mid-2008, when South Korea recalled its Ambassador from Tokyo as a protest against Japan’s announcement that its sovereignty over Takeshima was to be included in a handbook for junior high schools; it was followed by Korea’s ban of the sale of Japanese condoms, seeking to relabel the name "Sea of Japan" into "East Sea" at Russian and other maps, slaughtering live pheasants (Japan's national bird) outside the Japanese Embassy in Seoul, and enhancing habitability of the rocks (so far inhabited by two civilians and 50 policemen), by setting up a maritime science research center/team, digging wells to self-produce potable water, giving wider access by the public, developing tourism (through building a marine hotel and other means), holding military exercises near disputed islands, developing energy resources such as gas hydrates near these rocks and building a solar power facility upon them, as well as applying for UNESCO World Heritage Site status for the Takeshima/Tokdo Rocks.  


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The Republic of Korea has also been involved in a dispute with China over the submerged Ieodo/Suyan (Socotra) Rock, 4.6 meters below sea level at low-tide, which each of these states claims to be situated in its own 200-mile EEZ, not yet delimited with another; the Socotra Rock, which lies 149 kilometers (93 nautical miles) southwest of Marado, Korea, and 245 kilometers (153 nautical miles) northeast of Haijiao Island, China (and approximately 275 kilometers or 172 nautical miles from the nearest Japanese island of Torishima). It was discovered in 1900 by the British merchant vessel Socotra, and it holds the Ieodo Ocean Research Station and a helipad, built in 1995-2001, by South Korea, despite China’s objections. The island was officially designated as Ieodo by the Korea Institute of Geology on 26 January 2001, followed by China’s Foreign Ministry claiming these Korean unilateral activities to be illegal.21

China’s 2009 Preliminary Partial (East China Sea) Submission provided four profile lines (each of which includes six points from A to F) extending seawards from selected basepoints and it asserted that the outer limits of China’s CS in the East China Sea are located along the axis of the Okinawa Trough. However, as these areas are within 200-nautical mile zone of neighboring Japan, para. 11 of China’s Preliminary Submission specified, in accordance with UNCLOS Articles 74 and 83, that:

11. Following its consistent position, China will, through peaceful negotiation, delimit the continental shelf with States with opposite or adjacent coasts by agreement on the basis of international law and the equitable principles.22

Japan’s Note Verbale of 23 July 2009 was prompt in reserving its right to make additional comments on China’s position in the future and meanwhile stressing that:

It is indisputable that the establishment of the outer limits of the continental shelf beyond 200 miles in an area comprising less than 400 miles and subject to the delimitation of the continental shelf between the States concerned cannot be accomplished under the provisions of the UNCLOS.

This passage implies that were China to proceed with the Partial (East China Sea) Submission, Japan would request the CLCS to refrain from making Recommendations on such Submission.23

It is noteworthy that the discoveries of oil deposits in 1970 and the Chunxiao gas field in 2004 have led China and Taiwan to contesting Japan’s sovereignty over eight tiny, uninhabited Senkaku/Diaoyu (Fishing or Pinnacle) Islands (of 2.5 square miles in total), including five larger islands. These islands are Uotsuri, Kuba, Minami Kojima, Kita Kojima and Taisho, of which only Outsuri is larger than one square mile and possesses a lighthouse.
since 1978, with all those islands lying some 100 nautical miles east north-east of Taiwan, 200 nautical miles east of the Chinese mainland and 170 nautical miles west of Okinawa and being separated from the Japanese Ryukyu Islands by the Okinawa Trough, and with waters around Senkakus/Diaoyus being maintained as Free Fishing Zones under the 1997 China/Japan Fisheries Agreement and being covered by the 2008 China/Japan JDZ Agreement (Principled Consensus).[24] The 1992 Law on the Territorial Sea and the Contiguous Zone (Article 2) of China and its 1996 Declaration upon its’ UNCLOS

ratification expressly reaffirmed China's sovereignty over the disputed Senkaku/Diaoyu, Penghu, Pratas/Dongsha, Paracel/Xisha and Spratly/Nansha Islands; in the area of Senkakus/Diaoyus (enclosed by normal baselines of both Japan and Taiwan), which involves the pending China/Japan EEZ/CS delimitation, the straight baselines of both China along this part of its mainland, and Japan around its Ryukyu (Nansei) Islands, do not conform with UNCLOS' "deeply indented" coastline and "fringe of islands" requirements. Upon deposition by Japan on 14 March 2008 of its charts with the UN Secretary-General, China protested on 14 May 2008 Japan's chart marking Diaoyu Islands as Senkaku Shoto and their TS as violating the sovereignty of China and being null and void, with these arguments having been rejected in Japan's Reply of 20 June 2008, which asserted that Senkakus are "inherent territories of Japan" and that Japan's chart in question is legitimate. For these reasons, Japan's Note Verbales of 23 July 2009 also protested against China's 2009 Preliminary Partial (East China Sea) Submission to the CLCS quoted before. In 2010, Japan/China ties have grown strained over a September 8th collision between a Chinese fishing boat and two Japanese Coast Guard vessels near the disputed Senkakus. Japan released the 14-member crew and thereafter the Chinese captain from Japanese custody, but has rejected China's demand for an apology and compensation for allegedly unlawful holding of a Chinese fishing boat captain.


The Special Case of Okinotorishima - Japan, China, Republic of Korea

East of the Japanese Ryukyu Island chain and the Senkakus/Diaoyus, about 1,080 nautical miles south of Tokyo and midway between Taiwan and Guam (hosting an important U.S. military base) lie – some 1,280 meters apart – four barren Okinotorishima (Offshore Bird) Islets, which are located in a coral reef (of 3 square miles) and the low-tide nature of which (0.1 to 0.2 meters above high-tide) was as of 2005 protected by Japan at the expense of US $ 600 million, including 280 million spent on encasing these features in (25 meters in height) concrete, covering one of them with a $ 50 million titanium net, installing radar and drawing plans to build a $ 1 million lighthouse and an Ocean Thermal Energy Conversion (OTEC) system, with a view to countering China’s position that Okinotorishima is, under Article 121(3), not entitled to the 163,000 square miles of its EEZ claimed by Japan.29

Japan’s position that the Okinotorishima rocks are a full-fledged island under UNCLOS Article 121(1)-(2) was importantly reinforced in its 2008 Submission to the CLCS, where of the six regions, in which Japan claims outer continental shelf beyond 200 nautical miles, Okinotorishima Island was included within the Southern Kyushu-Palau Ridge (KPR) Region. This took place subject to assurance of Palau’s Note Verbale of 15 June 2009 that it had no objection to the CLCS considering and making Recommendations on this part of Japan’s Submission, without prejudice to delimitation of Japan/Palau outer CS in the future.30


30 Japan’s 2008 Submission - Section 4: Relevant Maritime Delimitations; Southern Kyushu-Palau Ridge (KPR) Region - Okinotorishima Island, at 4, 6 [Map - KPR], 8 referring to Palau's assurance [as confirmed by Palau's Note Verbale of 15 June 2009], and KPR Region at 9-11, and China’s Note Verbale of 6 February 2009 contesting inclusion of Okinotorishima as Article 121(3) rock in Japan’s Submission, as well as Note Verbale of the United States of 22 December 2008 stating that in areas from Haha Shima and Minami-Tori Shima Islands, the CLCS Recommendations on Japan’s Submission will be without prejudice to the U.S. outer CS limit and Japan/U.S. Northern Marianas boundary delimitation; and Note Verbale of South Korea of 27 February 2009, stating that Okinotorishima is an Article 121(3) rock, but that its consideration does not fall within the CLCS mandate, and Notes Verbales of China of 3 August 2011 and South Korea of 11 August 2011, reaffirming their requests that the CLCS takes no action on the part of CLCS Draft Recommendations related to Okinotorishima,
Prior to consent to Japan's Submission given by Palau, as the only (mini-)state involved in maritime delimitation in the Okinotorishima area, it was contested by China's Notes Verbales of 6 February 2009, 3 August 2011, and 5 April 2012, on the ground that "the so-called Okinotorishima Shima Island is in fact a rock as referred to in Article 121(3) of the UNCLOS" and that its EEZ/CS would illegally encroach upon the extent of the International Sea-Bed Area which is the "Common Heritage of Mankind" and which all UNCLOS States Parties are obliged to respect. 31 As China found inclusion of "the rock of Okinotorishima" [referred to by China without using "shima" - "island"] to be incompatible with UNCLOS Article 121(3), it requested the CLCS not to take any action on those CS portions both within and beyond 200 nautical miles, which are measured according to Japan's Submission from the rock of Okinotorishima. 32 The South Korean Notes Verbales of 27 February 2009, 11 August 2011, and 5 April 2012, respectively, stated that Okinotorishima is an Article 121(3) rock, but that its consideration does not fall within the CLCS mandate. 33 Palau's 2009 Submission to the CLCS reiterated that it did not prejudice the future Palau/Japan Outer CS Beyond 200 Miles Delimitation Agreement and likewise any such future Agreements between Palau/Indonesia, Palau/Philippines and Palau/Micronesia. With regards to the Palau/Japan boundary, Palau's 2009 Submission stressed that:


32 Id. Note also speculations that Chinese vessels have been mapping the seabed near Okinotorishima Islands over which American warships might pass on their way from the U.S. military base at Guam to Taiwan.

where potential overlap exists, is the subject of consultations between Palau and Japan. Palau’s Submission of, and the Commission’s consideration of and recommendation on, this area is without prejudice to the question of the delimitation of the continental shelf beyond 200 miles between Palau and Japan. The Government of Japan has indicated to the Government of the Republic of Palau that it has no objection to the Commission considering and making Recommendations on this part of the Submission, without prejudice to such delimitation.34

China’s attempt to include Article 121(3) into the Agenda of UNCLOS States Parties (SPLOS) failed, as both SPLOS and CLCS were not considered to be appropriate fora for determining the content of this provision.35 To reinforce its claim, Japan submitted on 19 January 2010 a bill to the Congress proposing the protection of the coastlines of remote islands, including Okinotorishima, as again protested by China.36 Notwithstanding its protests against Japan, on 26 December 2009, China itself enacted its Island Protection Law and in February 2010 China completed construction of 13 permanent facilities – stone tables and lighthouses – on islands, rocks and reefs in the East and South China Seas, with a view to clarifying its territorial waters’ baselines in these oil- and fish-rich areas.37 And notwithstanding its protests against Japan with respect to Okinotorishima, the Republic of Korea has intensified efforts to enhance habitability of Takeshima/Tok-do (Liancourt) Rocks


referred to above, and to re-channel them into full island category. Similar efforts have been intensified during the preparation of Partial Submission to the CLCS by Indonesia in regard of 88 small islets (of 0.02 up to 200 square kilometers), straddling boundaries that Indonesia shares with 10 states (Australia, India, Malaysia, Palau, Papua New Guinea, the Philippines, Singapore, Thailand, Timor-Leste, and Vietnam), and being subjected to a transmigration program, which aims at populating these islands and rocks and thereby providing them with entitlement to the EEZ/continental shelf.

Meanwhile, China’s and the Republic of Korea’s Notes Verbales of 6 and 27 February 2009, respectively, referred to above have not prevented the CLCS from instructing a Subcommission, which was set up in October 2009 to deal with Japan’s 2008 Submission, to also consider this Submission’s part related to Okinotorishima. The CLCS decision at the same time in 2009 and 2011 and in 2012 (by a 5:8:3 vote) that it would not take action on the Recommendations of this Subcommission in respect of the part related to Okinotorishima until a later point, demonstrates the CLCS’ hesitation whether a dispute over UNCLOS Article 121(3) is a dispute in the sense of Annex I of the CLCS Rules of Procedure. If the CLCS believed that Okinotorishima is an Annex I dispute, China’s and the Republic of Korea’s Notes Verbales of 2009 and 2011 would have directly prevented the CLCS from considering the Okinotorishima-related part of Japan’s 2008 Submission.

What will the CLCS ultimately do? Will the CLCS consider the Article 121(3) dispute – which in the case of Okinotorishima uniquely does not involve any delimitation dispute with protesting states – to fall within the ambit of UNCLOS Article 76(10) and Article 9 of its Annex II as well as Rule 46 and Annex I of the CLCS Rules of Procedure? And will the CLCS, therefore, given China’s and Korea’s Notes Verbales, reject its Subcommission’s Recommendations on the first Southern Kyushu-Palau Ridge (KPR) Region of Japan’s 2008 Submission where Okinotorishima is located?

Or will the CLCS consider the Article 121(3) dispute – especially because Okinotorishima does not uniquely involve any delimitation dispute with protesting states – as not falling within the scope of all “savings provisions” specified above, and will the CLCS, therefore, disregard China’s and Korea’s Notes Verbales and adopt Recommendations on the first Southern Kyushu-Palau Ridge (KPR) Region of Japan’s 2008 Submission, where Okinotorishima is located?

A question arises concerning whether Rule 46 and Annex I, covers disputes other than maritime/land delimitations and territorial questions, such as the dispute over the status of Okinotorishima as Article 121(3) rock. The Rule provides: “In case there is a dispute in the delimitation of the continental shelf between opposite or adjacent States or in other cases of unresolved land or maritime disputes”, and also “in other cases of unresolved land or maritime disputes.” The language of Rule 46 and Annex I of the CLCS Rules of Procedure seems sufficiently broad in to regard Okinotorishima, despite the fact that it uniquely does not involve any delimitation dispute, to belong to “other cases of unresolved land or maritime disputes.” If this interpretation was accepted, China’s and Korea’s Notes Verbales of 2009

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38 Ironically, in its dispute with Japan over Takeshima/Tok-do (Liancourt) Rocks, Republic of Korea maintains that these are Article 121(3) rocks as well, supra notes 18-20.
39 On the 2008 Indonesia’s Partial (North West of Sumatra) Submission, see infra note 54.
and 2011 would result in non-adoption by the CLCS of Recommendations on the first Southern Kyushu-Palau Ridge (KPR) Region of Japan’s 2008 Submission, where Okinotorishima is located. The CLCS decided in April 2012 by a 5:8:3 vote that it will not take action on the part of the KPR Region involving Okinotorishima, but added that this will continue until such time as the matters referred to in the Notes Verbales of China and Korea had been resolved.

However, there is a strong argument that both the wording and state practice in the CLCS with respect to Rule 46 and Annex I of the CLCS Rules of Procedure reinforce the fundamental principles of UNCLOS Article 76(10), which is clearly confined to “the question of delimitation of the continental shelf,” and Article 9 of UNCLOS Annex II, which is clearly confined to “matters relating to delimitation of boundaries.” Therefore, since Okinotorishima uniquely [amongst numerous actual and potential Article 121(3) rocks referred to before] does not involve any maritime delimitation other than with Palau, which gave its prior consent to Japan’s 2008 Submission, but since it does involve Japan’s dispute with China and the Republic of Korea over Okinotorishima’s legal status as Article 121(3) rock, the CLCS could consider this dispute as not covered by UNCLOS Article 76(10) and other “saving provisions” analyzed before, and it could disregard China’s and the Republic of Korea’s objections and adopt Recommendations on the first Southern Kyushu-Palau Ridge (KPR) Region of Japan’s 2008 Submission, where Okinotorishima is located, without prejudice to the future Japan/Palau delimitation. This solution would seem to be especially appropriate given that the three states concerned are also involved in contradicting claims with respect to the potential Article 121(3) rocks of Takeshima/Tok-do (Liancourt), Socotra and Senkaku/Diaoyu Islands discussed earlier.\footnote{China’s and the Republic of Korea’s 2009 and 2011 Notes Verbales on Japan’s 2008 Submission, \textit{supra} notes 31-33; and discussion of disputes over Takeshima/Tok-do (Liancourt), Socotra and Senkaku/Diaoyu Islands in section on Northeast and East Asia - China, Japan, Republic of Korea in this article \textit{supra}.}

rejection would need to be based on concern with not prejudicing “application of other parts of the UNCLOS” (in this case, Article 121(3)).

If for whatever reason, the Recommendations of the Subcommission on the Okinotorishima related part of Japan’s 2008 Submission were not adopted by the CLCS, the question would arise whether the CLCS could seek – *proprio motu* or on Japan’s request – a legal expert opinion on Okinotorishima’s status as Article 121(1)-(2) island, and not as a potential UNCLOS Article 121(3) rock, in pursuance of Rule 57 on Advice by Specialists of the CLCS Rules of Procedure. This Rule has been invoked by Britain’s Note Verbale of 11 January 2011, when seeking expert legal advice on its 2008 Partial (Ascension Island) Submission, which was rejected by the CLCS.43 The usefulness of such legal expert advice could be illustrated by uncertainties surrounding the 2010 CLCS Recommendations on the UK’s Partial (Ascension Island) Submission, and in the context of the rejection in the 2008 CLCS Recommendations (Australia), of fixed points 732a and 960a of Heard and McDonald Islands referred to above. It could be assumed that expert legal advice could clarify puzzling acceptance in these 2008 Recommendations of points 665 to 732 of the outer CS of these Islands, although these points are also within the outer limit of the CS beyond 200 nautical miles of the AAT continental shelf submitted by Australia.44 However, given interpretative ambiguities inherent in Article 121(3), which are also apparent in conflicting claims of Japan, China and the Republic of Korea over Takeshima/Tok-do (Liancourt) Rocks, Socotra Rock and Senkaku/Diaoyu Islands, any expert legal advice pursuant to the CLCS Rules of Procedure (Rule 57) in the particular case of Okinotorishima, would not seem to be feasible.45 It is, therefore, to be hoped that the CLCS will ultimately disregard China’s and Korea’s Notes Verbales because the issue of Article 121(3) rocks not involving delimitation disputes falls outside the scope of disputes under CLCS Annex I, and that it will adopt its Subcommission’s Recommendations on the Okinotorishima related part (the first Southern Kyushu-Palau Ridge (KPR) Region) of Japan’s Submission, without prejudice – pursuant to

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45 See our comments on UNCLOS Article 121(3) and suggested customary law Article 121(4) in the main text accompanying supra notes 4 and 15. On disputes over Takeshima/Tok-do (Liancourt) Rocks, Socotra Rock and Senkaku/Diaoyu Islands, see section of Northeast and East Asia - China, Japan, Republic of Korea supra. On legislation of both China and Japan reinforcing their claims to islands, rocks and reefs, see supra notes 36-39.
UNCLOS Article 76(10) – to the Japan/Palau delimitation referred to above.\textsuperscript{46}

**Southeast Asia - China, Malaysia, Vietnam, Brunei, Indonesia, Philippines**

Paragraph 10 of its 2009 Preliminary Partial (East China Sea) Submission provides that:

10. China reserves its right to make Submissions on the outer limits of the continental shelf that extends beyond 200 miles in the East China Sea and \textit{in other sea areas} (emphasis added),

This language can be construed as presaging another China’s Partial (South China Sea) Submission.\textsuperscript{47} Such a Submission, however, seems for the time being to be unlikely given China’s notorious U-shaped line claim with a view to indicating its ownership of Spratly/Nansha (Truong Sa/Kalayaan), Paracel/Xisha (Hoang Sa) and Scarborough/Huangyan Dao within this U-line and given that South China Sea disputes are long-standing, multi-state, and involve valuable resources in addition to other strategic considerations.\textsuperscript{48}

The largest of Spratly/Nansha (Truong Sa/Kalayaan) Islands is a sandy cay, Itu Aba/Taiping Island, which is elliptical in shape of 1.4 kilometers in length and 0.4 kilometers in width (and average altitude of 3.8 meters), with a land area of only 489,600 square meters. The cay forms part of the Tizard Bank/Zheng He Reefs (one of 7 reefs in the Spratlies), and it was claimed by France as part of French Indochina in 1887 and first occupied on 10 April 1930. It was invaded by Japan during WW II and converted to a submarine base, and it has been occupied by Taiwan since September 1956, but also claimed by China, Vietnam and the Philippines. Itu Aba/Taiping is located about 1,000 kilometers south of Taiwan and 35 kilometers south-southwest of the Philippine-occupied Loiata/Kota Island. It hosts around 200 Taiwanese Coast Guard personnel and 600 Taiwanese soldiers, has abundant flora and fauna, serves as a rest stop for Taiwanese fishermen and is fitted with a lighthouse, radio and Taiwan’s Central Weather Bureau stations, two water wells and a new [built in 2006-2007] 1,150-meter airstrip on which a C-130 Hercules transporter airplane first landed on 21 January 2008, followed by a visit of Taiwan’s President Chen Shui Bian, accompanied by a significant naval force on 2 February 2008.\textsuperscript{49}

\textsuperscript{46} See main text accompanying supra notes 40-41.
\textsuperscript{48} Lathrop (2011), supra note 2, at 4153. On China’s U-shaped line claim, see supra note 25.
The disputed and longstanding claims over Spratly/Nansha (Truong Sa/Kalayaan) and Paracel/Xisha (Hoang Sa) Islands prompted the Joint Malaysia/Vietnam Submission to the CLCS of 6 May 2009 and Vietnam’s Partial (North Area) Submission of 7 May 2009. The provocative Joint Submission divided all of the CS beyond 200 nautical miles located in the gap between the EEZs of these two states, without any account of any possible rights of China, Brunei and the Philippines, and without any account of any possible EEZ/CS of any of the Spratly Islands, thus implying that they are all rocks, pursuant to UNCLOS Article 121(3). In the event that their maritime zones were extended, this could in fact eliminate any outer CS in this part of South China Sea.50 Vietnam’s Partial (North Area) Submission asserted the Absence of Disputes and that this Submission was “without prejudice to the maritime delimitation between Vietnam and other relevant costal States.” Moreover, the Submission indicated that “Vietnam has undertaken efforts to secure the non-objection of the other relevant coastal States.” Unlike in all other Submissions discussed in this article, Vietnam did not name any “other relevant coastal States.” The 2009 Joint Malaysia/Vietnam Submission also did not name any other relevant states, but it did admit that “there are unresolved disputes in the Defined Area of this Joint Submission” and it cautiously assured the CLCS, “to the extent possible, that this Joint Submission will not prejudice matters relating to the delimitation of boundaries between States with opposite or adjacent coasts”, and that Malaysia/Vietnam “have undertaken efforts to secure the non-objection of the other relevant coastal States.”

Nevertheless, by means of Notes Verbales of 13 April 2009, 7 May, and 13 May

Whereas the 2009 Joint Malaysia/Vietnam Submission excluded any eventual rights to any Spratlies/Nansha (Truong Sa/Kalayaan) of China, Brunei nevertheless filed its Preliminary Submission of 12 May 2009 before the CLCS. The Submission envisages a full Bruneian Submission in respect of the outer CS (the Northwest Borneo Shelf, the Northwest Borneo Trough and the Dangerous Grounds), which is already subject to the Malaysia/Vietnam Joint Submission discussed above; Brunei’s Preliminary Submission notes that there may exist areas of potential overlapping entitlements in respect of its outer CS beyond 200 nautical miles and that following all other Submissions filed with the CLCS, Brunei’s Preliminary Submission “is made without prejudice to any future delimitation of boundaries with other States.”\(^53\)

In view of strong protests and counter-protests concerning Vietnam’s 2009 Partial (North Area) Submission and Malaysia/Vietnam’s 2009 Joint Submission discussed above, it appears likely that they will not be considered by the CLCS, and that Brunei will not proceed with its actual Submission, which – as it follows from Brunei’s 2009 Preliminary Submission referred to above – would overlap with the South China Sea area already covered by the Joint Malaysia/Vietnam Submission. Further submissions were announced in Indonesia’s Partial (North West of Sumatra) Submission of 16 June 2008, which noted that “Submissions of the outer limits of the extended continental shelf of Indonesia in other areas will be made at a later stage”.\(^54\)


Palau’s 2009 Submission announced that it did not prejudice a future Palau/Indonesia Outer CS Delimitation Agreement and any future Agreements between Palau/Japan (Okinotorishima), Palau/Philippines and Palau/Micronesia, referred to before. In its Note Verbale of 4 August 2009, the Philippines noted its overlapping EEZ and outer CS with Palau and requested that the CLCS refrain from considering Palau’s Submission until after Palau and the Philippines have discussed and resolved their disputes; in reply, Note Verbale of Palau of 22 July 2010 recalled that its 2009 Submission had been duly notified in advance to the Philippines as being without prejudice to a future Palau/Philippines outer CS delimitation, which was not a subject of any dispute, and that the Philippines government was invited to engage in negotiations on a possible boundary with Palau.\(^5\)

In parallel to preparing the Philippines’ Partial (Benham Rise) Submission to the CLCS, it was debated whether to exclude or to enclose the disputed Scarborough Reef/Huangyan Dao – along with Spratlies/Nansha (Truong Sa/Kalayaan) – by the Philippines archipelagic baselines. The uninhabited Scarborough/Huangyan Dao Reef, which is disputed by China, Taiwan and the Philippines, lies 137 nautical miles from the west coast of Luzon and was used by the U.S. military in the 1990s. The Reef comprises chains of reefs and rocks, including South Rock (10 feet high), with a total area of 150 square kilometers, which would generate an EEZ/CS area of 54,000 square miles, and the longstanding use of which by fishermen from all its three claimants justifies, in Victor Prescott's and Clive Schofield’s view, its exclusion from Article 121(3) rocks category; even though, were Scarborough Reef to be awarded to the sovereignty of China (which includes Scarborough Reef into geographically separate and low-tide Macclesfield/Zhongsha Bank\(^6\)), the Philippines would likely advocate its discounting as a basepoint for drawing of the equidistant boundary.\(^7\)


\(^{56}\) China includes Scarborough Reef into geographically separate and low-tide Macclesfield/Zhongsha Bank, which is claimed by China, Taiwan and the Philippines and is located 80 miles east of the Paracel Islands, distantly [about 280 miles] southwest of the Pratas Islands, 270 miles west of the Luzon, 290 miles east of Vietnam and north of the Spratly Islands. See http://en.wikipedia.org/wiki/Macclesfield_Bank; Limits in the Seas No.127 - Taiwan’s Maritime Claims (U.S. Department of State 2005), at 14, available at http://www.state.gov/e/oes/ocs/maps/opa/c16065.htm, stating that while Taiwan claims the normal baseline for Macclesfield Bank [even though Taiwan depicts TS/CZ only around Scarborough Reef], this Bank is submerged at high-tide and as it lies seaward of the outer TS of an island, it cannot have TS of its own.

delimitationagreementandanyfutureagreementsbetweenpalau/japan,(okinotorishima),palau/philippinesandpalau/micronesia,
referredtoastore.ineitsnoteverbaleofpalauof4august2009and22july2010,respectively,onalpau’s2009submission,availableatwww.un.org/depts/los/clcs_new/submissions_files/submission_plw_41_2009.htm;statementbytheclcschairman,un
depoll(2010),supranote16,at551:figure29.4anda560-561[palau],notingthatthewesternpartofpalau’s2009submissionisconstructedbyahedberglinefrom128pointsandislimitedbyphilippine’s200-milelimits,andcoversabout27,704squarekmfigure29.4).chinaincludesscarboroughreefingeo
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macclesfieldzhongsha
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\(^{57}\) V. Prescott & C. Schofield, The Maritime Political Boundaries (2005) 28-31, 433-435; and Figure 18.4 at 626 (2005), available at http://www.brill.nl/maritime-political-boundaries-world, also noting that were the Philippines to hold Scarborough Reef, a line of equidistance based on it would still be 140 miles from the nearest Chinese territory in the Xisha Qundao (Paracel Islands), which lies 150 miles from Hainan Dao that might be considered part of the Chinese mainland; the Scarborough Reef Maps are available at www.iglou.com/n4gn/sr/maps.html, noting 3 rocks it comprises; see also http://pubs.wri.org/pubs_content_text.cfm?ContentID=86; and http://en.wikipedia.org/wiki/Scarborough_Shoal.
The Philippine Archipelagic Baselines Act No. 9522 eventually provided – despite of protests from China, Vietnam and Taiwan – that baselines around the disputed Scarborough Reef/Huangyan Dao and Spratlies/Nansha (Truong Sa/Kalayaan), would be determined under “the UNCLOS regime of islands.” Therefore, in its Note Verbale of 13 April 2009, China protested Philippine Act No. 9522 of 10 March 2009 Amending Archipelagic Baselines Act No. 3046 of 17 June 1961, as Amended by Act No. 5446 of 18 September 1968, on the ground that the above 2009 Act illegally claims Huangyan Dao Island/Scarborough Reef (referred to in this Act as Bajo de Masinloc), and some islands and reefs of Spratly/Nansha Islands (referred to as Kalayaan Island Group) of China as “areas over which the Philippines likewise exercises sovereignty and jurisdiction.” China’s Note reiterated that any claim to territorial sovereignty over Huyangyan Island and Nansha Islands by any state other than China is null and void.58

Philippines’ Partial (Benham Rise) Submission to the CLCS of 8 April 2009, clearly related only to the Benham Rise, which is located to the east of Luzon in the Pacific Ocean and which is not subject to any maritime boundary disputes; but its Sections 3.3-3.4 envisaged future Submissions in the hotly disputed South China Sea by providing that:

3.3 Exercise of the Option of Partial Submission

As a gesture of good faith, the Philippines makes this Partial Submission in order to avoid creating or provoking maritime boundary disputes where there none, or exacerbating them where they may exist, in areas where maritime boundaries have not yet been delimited between opposite or adjacent coastal States. This is to build confidence and promote international cooperation in the peaceful and amicable resolution of maritime boundary issues. It does not in any manner prejudice the position of any coastal States.

3.4 Reservation of the Right to Make Other Submissions in the Future

Accordingly, this Partial Submission is made with reference to the Benham Rise Region along the Pacific coast and does not include other areas. The Philippines expressly reserves its right to make other Submissions for such other areas of the continental shelf beyond 200 miles at a future time in conformity with the provisions of Annex I to the Rules of Procedure of the CLCS.59

The foregoing reservation and commitment by the Philippines have been interpreted as envisaging its possible South China Sea Submission that would cover the disputed Scarborough Reef/Huangyan Dao and Spratlies/Nansha (Truong Sa/Kalayaan) in the future.

In view of all these actual and prospective South China Sea Submissions, China enacted on 26 December 2009 its Island Protection Law, referred to before, and in February 2010 China completed construction of 13 permanent facilities – stone tablets and lighthouses – on islands, rocks and reefs in the East and South China Seas, with a view to clarifying its territorial waters’ baselines in these oil- and fish-rich areas.60 By December 2010, China has constructed – in the disputed Spratlys area – a lighthouse on low-tide Subi Reef/Zhubi Dao, which Chinese troops are occupying (using 3-story buildings, wharfs and helipad), but is being claimed by the Philippines and Vietnam, at 16 nautical miles southwest of Philippine-occupied Thitu (Pagasa) Island.61

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The full docket of the CLCS and a close link between process of disputed and undisputed boundary delimitations (by states and the judicial-arbitral fora), and the process of delineation of the outer CS limit beyond 200 nautical miles (by the CLCS), will ensure that the CLCS continues to stimulate law of the sea development and peaceful settlement of oceans disputes within the United Nations as a part of the global system of peace and security for at least the next two decades, when the remaining Submissions will be filed (e.g., by Honduras-2012, Kiribati-2013, Canada-2013, Denmark-2014, Morocco-2017, Liberia-2018), and when Preliminary Submissions will be replaced by their full versions. Such replacement is expected in the case of, e.g., Angola, D. R. of Congo (Kinshasa), Republic of Congo (Brazzaville), Cameroon, Sao Tome & Principe, Sierra Leone and perhaps also of China and the Republic of Korea with respect to East China Sea, unless their actual future Submissions were deferred due to protests by Japan. In addition, some 7 of the present 35 non-parties (of which 18 are land-locked) to the UNCLOS, including the United States, Colombia, Ecuador, El Salvador, Iran, Peru and Timor-Leste, may file Submissions with the CLCS if they become UNCLOS parties. The UNCLOS and CLCS Rules of Procedure as well as vast state practice of filing full and/or preliminary Submissions with the CLCS in Northeast and Southeast Asia and all other regions, clearly indicate that the CLCS’ Recommendations must in no way encroach upon existing and prospective boundary delimitations. Such submissions must not prejudice other land or maritime disputes, which can thus well be adjudicated-arbitrated or otherwise resolved prior or in parallel to, or sometimes in a follow-up to the CLCS’ engagement. While deferral is not the desired outcome when making Submissions, even such deferred (like, e.g., those concerning Okinotorishima or South China Sea/Spratlies-Paracels discussed above) Submissions and certainly all other, will continue to play a distinct role in the search by states for means of resolution of their disputed and undisputed maritime boundary delimitations and other unresolved land or maritime disputes.


63 See supra notes 9, 14.
Annex: Maps of the most relevant disputed areas

Map from: http://www.privateislandnews.com/dokdo-or-takeshima-that-is-the-question-2/

Location of the Liancourt Rocks in the Sea of Japan (East Sea) between South Korea and Japan at: http://en.wikipedia.org/wiki/Liancourt_Rocks

Map from: http://www.bbc.co.uk/news/world-asia-17093549

Map for the CLCS Recommendations of 19 April 2012 from:
http://www.asiaone.com/News/AsiaOne%2BNews/Asia/Story/A1Story20120429-342721.html