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ARTICLE

The Approach of the Commission on the Limits of the Continental Shelf to Submissions Involving Unresolved Disputes: Should It Be Modified?

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Abstract

Paragraph 5(a) of Annex I to the Rules of Procedure of the Commission on the Limits of the Continental Shelf has been invoked by states to block the Commission's consideration of several submissions made by coastal states. The paragraph introduces several new factors into the delineation process of the continental shelf beyond 200 nautical miles, which had not been envisaged by the United Nations Convention on the Law of the Sea. In addition, this has had significant consequences in respect of the completion of the delineation process, and thus the realization of one of the key objects and purposes of the Convention – that is, to create certainty about the extent of the continental shelf and the limits of the area. This article examines whether Paragraph 5(a) is in accordance with the Convention, and whether there is an alternative approach that may have a more limited impact on the delineation process.

Keywords: Law of the Sea; Dispute Settlement

The United Nations Convention on the Law of the Sea (UNCLOS or "the Convention") sets up a procedure for the establishment of the outer limits of the continental shelf beyond 200 nautical miles of the baselines from which the breadth of the territorial sea is measured (outer continental shelf or OCS).[1] According to this procedure, which is contained in Article 76(8) of the Convention, the coastal state shall make a submission containing information on the outer limits of its OCS to the Commission on the Limits of the Continental Shelf (CLCS). The CLCS shall then make recommendations to the coastal state. The outer limits established by the coastal state on the basis of these recommendations shall be final and binding.[2]

The CLCS came into operation in 1997. The first submission was made in 2001. As of August 2021, the Commission received ninety-six submissions and made thirty-six recommendations.[3] Among these submissions, the CLCS decided to defer the consideration of

[1] *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 397 (entered into force 16 November 1994) [*UNCLOS*].

[2] *Ibid*, art. 76(8).

[3] The number includes 87 original submissions and 9 revised submissions. As some states made several submissions individually and/or jointly in respect of different portion of their OCS, the number of states making submissions to the CLCS is 74. For information on the submissions, relevant documents, and recommendations

twenty submissions due to the presence of an unresolved dispute between the coastal state and other states, and the other states declined to give the CLCS consent to consider them. The possibility of a party to a dispute relating to a submission blocking the CLCS's consideration of a submission is envisaged in Paragraph 5(a) of Annex I to the Rules of Procedure of the CLCS (RoP).[4]

The consequences of a deferral are quite significant. A deferral means that the CLCS will not make recommendations to the coastal states. Without recommendations from the CLCS, they will not be in a position to establish the final and binding outer limits of their OCS. The legal uncertainty created by the absence of outer limits may complicate the exercise of the rights and obligations of the coastal state and other states in the area concerned, which may then lead to disputes between them. This uncertainty may also have implications for the International Seabed Authority (ISA).[5] The ISA was established by the UNCLOS to organize and control exploration activities and exploitation of resources in the Area.[6] Although having such power over the area, the ISA does not have the power to determine the limits of the Area,[7] which are the outer limits of the continental shelf.[8] The absence of the final and binding outer limits of the OCS means that the limits of the Area in some areas cannot be determined. The legal uncertainty and risks resulting from it may hinder the exploration and exploitation of the resources from these areas.

Bearing in mind that the UNCLOS is silent on whether the consideration of the submission may be deferred due to the presence of an unresolved dispute, the article examines whether Paragraph 5(a) is in accordance with the Convention. Furthermore, as suggested by some commentators, the paragraph may not be the most proper approach to deal with submissions involving an unresolved dispute.[9] The article also searches for an alternative approach that has a more limited impact on the right of a coastal state to establish the final and binding outer limits of its OCS. To set the background for the discussion, the paper starts with a brief introduction to the content of the paragraph and its application in practice.

I. Paragraph 5(a) Of Annex I to the Rop of the CLCS and its Impacts

A. The Content of Paragraph 5(a)

The CLCS sets up a special rule to deal with submissions involving unresolved disputes. Rule 46 of the RoP, which is entitled "Submissions in case of a dispute between States with opposite or adjacent coasts or in other cases of unresolved land or maritime

of the CLCS, see United Nations Division for Ocean Affairs and the Law of the Sea, "Submissions, through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982" (23 March 2022), online: DOALOS <https://www.un.org/depts/los/clcs_new/commission_submissions.htm>.

[4] *Rules of the Procedure of the Commission on the Limits of the Continental Shelf*, UN Doc. CLCS/40/Rev.1 (17 April 2008) [*RoP*].

[5] See Michael W. LODGE, "The Relevance and Importance of the Work of the Commission to the International Seabed Authority", *International Seabed Authority* (10 March 2017), online: International Seabed Authority, online: UN <https://www.un.org/depts/los/clcs_new/documents/Presentations/6_CLCS_20_ANNIVERSARY_Lodge.pdf>.

[6] *UNCLOS*, art. 156 and 157.

[7] *Ibid*, art. 134(4).

[8] *Ibid*, art. 134(3).

[9] Alex 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 Problem or Problem without a Solution?" in Myron H. NORDQUIST, John N. MOORE and Ronán LONG, eds., *Legal Order in the World's Oceans: UN Convention on the Law of the Sea* (Leiden: Brill, 2017), 302 at 302; and Andrew SERDY, "The Commission on the Limits of the Continental Shelf and its Disturbing Propensity to Legislate" (2011) 26 The International Journal of Marine and Coastal Law 355.

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disputes", provides that these submissions shall be considered in accordance with Annex I of the RoP that has the same title.[10] Paragraph 5(a) is a procedural rule contained in this Annex I. The paragraph provides that:

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

The wording of the first sentence of the Paragraph indicates that the CLCS shall not in principle consider a submission if it involves an unresolved land or maritime dispute. An exception to this principle is contained in the second sentence, which provides that the consent of all the parties to the dispute is the condition for the consideration of such a submission.

The reference to "a land or maritime dispute" implies that Paragraph 5(a) may apply to a broad range of disputes. A "land" dispute may refer to a dispute concerning territorial sovereignty over a piece of land or a land boundary, while a "maritime" dispute may cover all disputes concerning the interpretation or application of one or more rules of the international law of the sea including but not limited to those of UNCLOS.[11] In practice, Paragraph 5(a) has been invoked in relation to submissions that involve, inter alia, delimitation disputes, territorial disputes, and the interpretation and application of one or more provisions of the UNCLOS.[12]

The dispute must, however, be "related to the submission".[13] In order to determine whether a dispute exists in relation to a submission, the RoP requires the coastal state to inform the CLCS if this is the case.[14] To make the determination, the CLCS also relies on the responses of other states to the submission made by the coastal state. The practice of the CLCS relating to Paragraph 5(a) shows that the threshold to determine the existence of a dispute falling within the scope of Paragraph 5(a) is low; in the view of the CLCS, such a dispute exists when, in response to a submission made by the coastal state, one or more states informs the United Nations Secretary-General, in the form of a note verbale, of the existence of an unresolved dispute between it and the coastal state.[15] In other words, a

[10] *RoP*, Rule 46(1). Rule 46(2) repeats Article 9 of Annex II to UNCLOS which provides that "[t]he actions of the Commission shall not prejudice matters relating to the delimitation of boundaries between States". This article is discussed further below.

[11] Land disputes were submitted before international courts and tribunals, such as the dispute concerning a land boundary between Costa Rica and Nicaragua in the northern part of Isla Portillos (*Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, [2018] I.C.J. Rep. 139), or the dispute concerning the sovereignty over a number of islands between Malaysia and Singapore (*Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, [2008] I.C.J. Rep. 12). Maritime disputes include disputes, inter alia, concerning maritime delimitation (e.g. *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, [2021]), immunities of warships such as *The "ARA Libertad" case (Argentina v. Ghana)*, or concerned a mixed of various maritime disputes such as the *South China Sea Arbitration (The Philippines v. China)* arbitration, which disputes on the legal basis for maritime entitlements, the status of maritime features, violations of the rights of the coastal states, protection of marine environment, navigational safety).

[12] For an in-depth discussion on the types of disputes have been raised by states to invoke Paragraph 5(a), see Signe Veierud BUSCH, *Establishing Continental Shelf Limits beyond 200 Nautical Miles by the Coastal State: A Right of Involvement for Other States?* (Leiden/Boston: Brill Nijhoff, 2016). In this manuscript, Busch examines whether these disputes are within the scope of Paragraph 5(a).

[13] *RoP*, Annex I, Paragraph 2.

[14] *Ibid*, Paragraph (2)(a).

[15] Information concerning the submission, reactions of other states and the decisions of the CLCS to defer the consideration of a submission can be found at the website of the CLCS, see United Nations Division for Ocean

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dispute concerning the existence of a land or maritime dispute is sufficient to trigger Paragraph 5(a).

Is this way of determining the existence of a dispute in accordance with the definition of a dispute in general international law? A dispute is defined as "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons".[16] On the one hand, information from the coastal state and other states will bring to the surface the fact that the states concerned have such a disagreement or are in conflict. In some cases, evidence of the existence of a dispute is obvious when the coastal state and other states are involved in an extensive exchange of notes verbales in the years following the making of the submission. For example, in 2009, Malaysia and Vietnam made a joint submission to the CLCS in relation to the southern part of the South China Sea. This triggered an exchange of ten notes verbales between China, Indonesia, Malaysia, the Philippines, and Vietnam from 2009 to 2011.[17] The content of these notes verbales clearly shows there were unresolved land and maritime disputes between these states in the area in question, including the land dispute over the Spratly Islands between Vietnam, China, and the Philippines; the land dispute over North Borneo between Malaysia and the Philippines; and the maritime dispute over the maritime claims of China based on the nine-dash line. More recently, in response to the submission made by Malaysia in 2019, twenty-eight notes verbales and other diplomatic correspondences have been exchanged by eleven states, including Australia, China, France, Germany, Indonesia, Japan, New Zealand, the Philippines, the United Kingdom, the United States, and Vietnam.[18] The exchange of these diplomatic correspondences undoubtedly highlights the existence of a number of disputes concerning the maritime claims of China in the South China Sea.

On the other hand, it must be pointed out that the threshold to determine the existence of a dispute falling within the scope of the paragraph is lower than that of international courts and tribunals. The paragraph is expected to apply in the case of

Affairs and the Law of the Sea, *supra* note 3. Except for the submission made by Guyana (objected by Venezuela) and the submission made by Pakistan (objected by Oman), the CLCS decided to defer the consideration of the submissions when one or more states raised an objection. In the case of the submission made by Guyana, it is perhaps that the CLCS did not apply Paragraph 5(a) to defer the consideration of the submission as requested by Venezuela because Venezuela is not a party to UNCLOS. If this is the case, the right to invoke Paragraph 5(a) would be reserved to states that are parties to UNCLOS only. In the case of the submission made by Pakistan, the CLCS seemed to disregard the objection made by Oman in 2009, when, in 2013, it decided to consider the submission. It is worth noting that Oman did not object to the decision of the CLCS. In 2014, Oman officially withdrew the objection after Pakistan submitted a note verbale in which, pursuant to the bilateral discussions in 2012, it recognised that there may be overlap between the area included in its submission and the potential OCS of Oman. Regarding the notes verbales, see United Nations Division for Ocean Affairs and the Law of the Sea, "Commission on the Limits of the Continental Shelf (CLCS) Outer limits of the continental shelf beyond 200 nautical miles from the baselines: Submissions to the Commission: Submission by the Islamic Republic of Pakistan" (7 December 2021), online: DOALOS <https://www.un.org/Depts/los/clcs_new/submissions_files/submission_pak_29_2009.htm>.

[16] *Mavrommatis Palestine Concessions (Greece v. U.K.)*, Judgment No. 2, 30 August 1924, [1924] PCIJ (Ser. A) No. 2 at 11, para. 11.

[17] See United Nations Division for Ocean Affairs and the Law of the Sea, "Commission on the Limits of the Continental Shelf (CLCS) Outer limits of the continental shelf beyond 200 nautical miles from the baselines: Submissions to the Commission: Joint submission by Malaysia and the Socialist Republic of Viet Nam" (3 May 2011) online: DOALOS <https://www.un.org/depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm>.

[18] See United Nations Division for Ocean Affairs and the Law of the Sea, "Commission on the Limits of the Continental Shelf (CLCS) Outer limits of the continental shelf beyond 200 nautical miles from the baselines: Submissions to the Commission: Partial Submission by Malaysia in the South China Sea" (17 February 2022) online: DOALOS <https://www.un.org/depts/los/clcs_new/submissions_files/submission_mys_12_12_2019.html>.

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potential disputes,[19] which implies that in some cases the existence of a dispute is not required.[20] An example of the application of the paragraph to a potential dispute is the case of the submission made by Yemen in respect of southeast of Socotra Island. The CLCS deferred the consideration of the submission on the basis of the note verbale made by Somalia requiring the CLCS to do so.[21] However, Somalia was, at the time, not sure whether there was a delimitation dispute with Yemen over the area subject to the submission. Somalia acknowledged that available evidence was not sufficient to establish the extent of its OCS, and thus only claimed that "[t]here may [...] be a *potential* overlap between the areas of the continental shelf beyond 200 nautical miles claimed by the two coastal States" (emphasis added).[22] In the case of international courts and tribunals, a dispute over which they have jurisdiction must be an actual dispute, not a potential or hypothetical one.[23] The different meaning of the term "dispute", as understood by the CLCS and the international courts and tribunals, may be due to the fact the CLCS is a technical body and not a court of law.

B. The Impacts of Paragraph 5(a)

In practice, as of June 2021, Paragraph 5(a) has been invoked in relation to sixty-one submissions among which – with the consent of other states that were parties to the dispute related to the submission – the CLCS decided to proceed with only thirty-five submissions.[24] Due to the absence of consent, the CLCS decided to defer the consideration of twenty submissions.[25] For the remaining six submissions, the CLCS decided to consider

[19] The Chairman of the CLCS has noted that Annex I, including Paragraph 5(a) was developed to deal with "the issue of how the Commission should treat possible submission containing areas under actual or potential delimitation dispute". See "*Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission*", Doc. CLCS/7 (15 May 1998), at 2, para. 5.

[20] Alex G. OUDE ELFERINK, "The Continental Shelf of Antarctica: Implications of the Requirement to Make a Submission to the CLCS under Article 76 of the LOS Convention" (2002) 17(4) The International Journal of Marine and Coastal Law 485 at 501.

[21] *Statement by the Chairperson of the Commission on the Limits of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission*, Doc. CLCS/68 (17 September 2010), at 5–6, paras. 16–9.

[22] Office of the Prime Minister of the Transitional Federal Government of the Somali Republic, "Note verbale dated 19 August 2009 by the Transitional Federal Government of the Somalia Republic to the United Nations Secretary-General", online: United Nations <https://www.un.org/depts/los/clcs_new/submissions_files/yem09/som_re_yem_clcs18.pdf>.

[23] *Case concerning the Northern Cameroons (Cameroon v. United Kingdom)*, [1963] I.C.J. Rep. 15 at 33–4; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, [2016] I.C.J. Rep. 100 at 138–9, paras. 123–4 [*Nicaragua v. Colombia*].

[24] Russian Federation; Russian Federation – Partial revised submission in respect of the Okhotsk Sea; Russian Federation – partial revised submission in respect of the Arctic Ocean; Ireland – Porcupine Abyssal Plain; New Zealand; Norway – in the North East Atlantic and the Arctic; Barbados; Indonesia – North West of Sumatra Island; Suriname; Uruguay; The Cook Islands – concerning the Manihiki Plateau; Ghana; Iceland – in the Ægir Basin area and in the western and south-eastern parts of Reykjanes Ridge; Denmark – In the area north of the Faroe Islands; Pakistan; Kenya; Nigeria; Côte d'Ivoire; Sri Lanka; Portugal; Tonga; Spain – in respect of the area of Galicia; Trinidad and Tobago; Cuba; Guyana; United Republic of Tanzania; Denmark – in respect of the Southern Continental Shelf of Greenland; Kiribati; Federated States of Micronesia – in respect of the Eauripik Rise; Denmark – in respect of the North-Eastern Continental Shelf of Greenland; Bahamas; Tonga – in the western part of the Lau-Colville Ridge; Joint submission by Cabo Verde, The Gambia, Guinea, Guinea-Bissau, Mauritania, Senegal and Sierra Leone – in respect of areas in the Atlantic Ocean; Denmark – in respect of the Northern Continental Shelf of Greenland; and Spain – in respect of the area west of the Canary Islands.

[25] Myanmar; Yemen – in respect of south east of Socotra Islands; United Kingdom – in respect of Hatton Rockall Area; Iceland – in respect of Hatton-Rockall Area; Fiji; Joint submission by Malaysia and Vietnam – in the southern part of the South China Sea; Vietnam – in the North Area (VNM-N); United Kingdom – in respect of the Falkland Islands and of South Georgia and the South Sanwich Islands; Maldives; Denmark – Faroe-Rockall

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only the parts of the submissions that were not related to the dispute.[26] In short, of 101 submissions made to the CLCS so far, nearly two-thirds of them were affected by Paragraph 5(a), while one-quarter will not be considered, either wholly or in part, by the CLCS. For the coastal states that have had the consideration of their submissions deferred by the CLCS, they will be unable to establish the final and binding outer limits of their OCS. The absence of such outer limits potentially creates legal uncertainty as to the exercise of the rights and obligations of the coastal states and those of other states. Furthermore, as noted at the beginning of this paper, if the coasts of the coastal state face open seas, such an absence means that the limits of the Area are undetermined, which may affect the exploration and exploitation of the resources of that area by the ISA due to the lack of legal certainty.

Furthermore, due to the persistent nature of the disputes between the states concerned, the consideration of some submissions has been deferred for a long time; for others the deferral may be indefinite. One example is the three submissions made in respect of the South China Sea by Malaysia and Vietnam. The exchange of notes verbales between the states concerned, as mentioned above, shows that there is no hint that Malaysia and Vietnam might obtain the consent from the other parties to the dispute, especially China. Consequently, it is highly unlikely that the CLCS will consider these submissions in the foreseeable future. The other example involves the submissions made by the United Kingdom and Argentina concerning the outer limits of the OCS of the Falklands/Malvinas, over which sovereignty is claimed by both states.[27] In 1982, both states were involved in a war over the control of the islands – the so-called "Falklands War" in English or "Guerra de las Malvinas" in Spanish. It is unlikely that either state will give consent for the consideration of the submission of the other state.

II. Is Paragraph 5(a) in Accordance with UNCLOS?

A. Paragraph 5(a) and UNCLOS: A Preliminary Observation

At first glance, Paragraph 5(a) seems to lack a legal basis under UNCLOS. Firstly, Paragraph 5(a) introduces new factors that are not expressly provided for or mentioned in UNCLOS.[28] It gives the CLCS the "right" not to consider a submission and not to make recommendations. According to Article 76(8), the Commission "shall make recommendations to the coastal State". The word "shall" indicates a legal obligation to make recommendations.

Plateau Region; Bangladesh; Gabon; China – in Part of the East China Sea; Republic of Korea; Nicaragua – in the southwestern part of the Caribean Sea; Angola; Canada – in respect of the Atlantic Ocean; France – in respect of Saint-Pierre-et-Miquelon; Somalia; and Mauritius – concerning the Southern Chagos Archipelago region.

[26] Australia; France – in respect of the areas of French Guiana and New Caledonia; Japan; Argentina; and Norway – in respect of Bouvetøya and Dronning Maud Land; and India.

[27] United Nations Division for Ocean Affairs and the Law of the Sea, "Commission on the Limits of the Continental Shelf (CLCS) Outer limits of the continental shelf beyond 200 nautical miles from the baselines: Submissions to the Commission: Submission by the Argentine Republic" (14 June 2016) online: DOALOS <https://www.un.org/depts/los/clcs_new/submissions_files/submission_arg_25_2009.htm> and United Nations Division for Ocean Affairs and the Law of the Sea, "Commission on the Limits of the Continental Shelf (CLCS) Outer limits of the continental shelf beyond 200 nautical miles from the baselines: Submissions to the Commission: Submission by the United Kingdom of Great Britain and Northern Ireland" (10 September 209) online: DOALOS <https://www.un.org/depts/los/clcs_new/submissions_files/submission_gbr_45_2009.htm>.

[28] Alex G. OUDE ELFERINK, "Article 76 of the LOSC on the Definition of the Continental Shelf: Questions concerning its Interpretation from a Legal Perspective" (2006) 21(3) The International Journal of Marine and Coastal Law 269 at 283; Alex G. OUDE ELFERINK and Constance JOHNSON, "Outer Limits of the Continental Shelf and 'Disputed Areas': State Practice concerning Article 76(10) of the LOS Convention" (2006) 21(4) The International Journal of Marine and Coastal Law 461 at 466; Serdy, *supra* note 9 at 361–2.

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In the absence of a permissive rule in UNCLOS, Jensen observes that by giving the CLCS such a "right", Paragraph 5(a) enables the CLCS to act contrary to this duty to make recommendations per Article 76(8).[29] At the same time, the paragraph gives other states the "right" to block the consideration of a submission made by a coastal state. Nothing in UNCLOS offers an obvious legal basis for such a right. The creation of such rights for the CLCS and other states arguably puts the coastal state at a disadvantage. One may argue that in order to have its submission considered by the CLCS, the coastal state is subject to the condition of obtaining consent from other states – a condition that is not provided for by UNCLOS. If the coastal state fails to obtain the consent required under Paragraph 5(a), it is denied the right to have the outer limits of its OCS established in accordance with Article 76. Secondly, the delay in the establishment of the outer limits of the OCS is contrary to one of the objects and purposes of UNCLOS, which is to "create certainty about the extent of the continental shelf, and hence the limits of the Area".[30]

As the impact of Paragraph 5(a) is significant, one question that arises is whether Paragraph 5(a) is in accord with UNCLOS. The answer to this question depends on the considerations of the five issues discussed below.

B. Did the CLCS Have the Power to Adopt Paragraph 5(a) in the First Place?

First of all, as Paragraph 5(a) is a procedural rule adopted by the CLCS, the immediate issue that needs to be addressed is whether the CLCS has the power to adopt such a rule in the first place. UNCLOS does not contain any provision expressly governing this issue. While the CLCS is not an international organization, the doctrine of implied powers in international institutional law is often cited to argue that the CLCS possesses such powers.[31] According to this doctrine, an international organization may possess "implied powers"; namely, powers that are not explicitly conferred upon it by the constitutive instrument but are necessary for it to effectively exercise its functions and realize its objectives.[32] The key function of the CLCS is to consider the submissions made by coastal states and to make recommendations to those states.[33] In order to discharge this function, there must be some procedural arrangements on how the CLCS operates, such as rules on sessions and meetings, the venue, agenda setting, the election of a chairperson and the scope of his or her powers, the working language, the voting procedure, the quorum, and the step-by-step procedure for the consideration of submissions. It is beyond doubt that without these arrangements the CLCS will be unable to operate; thus they are essential for the CLCS to discharge its functions. However, the Convention does not contain any

[29] Øystein JENSEN, *The Commission on the Limits of the Continental Shelf: Law and Legitimacy* (Leiden/Boston: Brill, 2014) at 66.

[30] Oude Elferink, *supra* note 9 at 303.

[31] *Letter dated 25 August 2005 from the Legal Counsel, Under-Secretary-General of the United Nations for Legal Affairs, addressed to the Chairman of the Commission on the Limits of the Continental Shelf*, Doc. CLCS/46 (7 September 2005) at 7 [*CLCS/46*]; International Law Association's Committee on the Legal Issues of the Outer Continental Shelf, *Second Report* (2006) 13 [*ILA Second Report*]; Serdy, *supra* note 9 at 361 and footnote 16; Jensen, *supra* note 29 at 49–51; Busch, *supra* note 12 at 42.

[32] The doctrine of implied powers is repeatedly confirmed by the International Court of Justice, see *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] I.C.J. Rep. 174 at 179; *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, Advisory Opinion, [1954] I.C.J. Rep. 47 at 57; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, [1962] I.C.J. Rep. 151 at 168; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, [1996] I.C.J. Rep. 66 at 79.

[33] *UNCLOS*, art. 3(1)(a). The CLCS has two functions. Besides the function mentioned above, the CLCS is to provide advice if requested by the coastal state during the preparation of the submission to be submitted for the consideration of the CLCS (*UNCLOS*, art. 3(1)(b)).

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provision that provides the CLCS with any such arrangement; therefore, in order to discharge its functions, the CLCS must have an implied power to adopt its own procedural rules.

Furthermore, states parties to UNCLOS did not object to the CLCS having such an implied power. Indeed, the rules of procedure of the CLCS were first drafted at the request of the Meeting of States Parties.[34] Some rules, including Paragraph 5(a), were submitted to the Meeting of States Parties for their feedback prior to the CLCS adopting them.[35] The absence of any objection to the drafting and adoption of the RoP by the CLCS implies the acquiescence of states parties to the power of the CLCS to make its own rules of procedure.

Stating that the CLCS possesses the power to adopt the rules of procedure does not necessarily mean that this power is without limitation. On the contrary, those rules must be in accordance with UNCLOS.[36] In the other words, the RoP of the CLCS must in any case not be contrary to UNCLOS – the treaty that established the CLCS. Therefore, the next issue to be examined is whether Paragraph 5(a) is contrary to any provision of UNCLOS.

C. Paragraph 5(a) and Article 9 of Annex II to UNCLOS

Article 9 is first examined because Paragraph 5(a) is often suggested as having implemented this article.[37] This article provides that "[t]he actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts".

The term "prejudice" means "cause harm to (a state of affairs)".[38] According to Serdy, there are two ways to read this article: "either that the CLCS must take care to avoid actions that prejudice delimitations, or [...] that, provided the CLCS does not stray beyond its technical task, by definition nothing it does is capable of bringing about such prejudice".[39] He favours the latter reading.[40]

By contrast, Oude Elferink argues that the article does not provide that the actions of the CLCS "are without prejudice" to the matters related to delimitation, but it "instead instructs the Commission to ensure that no such prejudice results from its actions".[41] This interpretation is more in line with the ordinary meaning of the phrase "shall not prejudice". The word "shall" indicates an obligation while the word "prejudice", which is a verb, indicates an active obligation not to make detrimental impacts.[42] The second interpretation implies that there is no potential for the actions of the CLCS to prejudice

[34] *Report of the Fifth Meeting of States Parties*, Doc. SPLOS/14 (20 September 1996) at 11, para. 44.

[35] See *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of the work in the Commission*, Doc. CLCS/4 (17 September 1997) at 2 para 9 and 11; *Report of the Eight Meeting of States Parties*, Doc. SPLOS/31 (4 June 1998) at 11, para. 45.

[36] *CLCS/46*, *supra* note 31 at 8; Oude Elferink and Johnson, *supra* note 28 at 467; *ILA Second Report*, *supra* note 31; Serdy, *supra* note 9.

[37] Oude Elferink, *supra* note 20 at 500, footnote 67; Jensen, *supra* note 29 at 65–8; Oude Elferink, *supra* note 9 at 307.

[38] Oxford English Dictionary Online, "Prejudice", online: Lexico <https://www.lexico.com/definition/prejudice>.

[39] Serdy, *supra* note 9 at 364.

[40] *Ibid*, at 365.

[41] Oude Elferink, *supra* note 9 at 307.

[42] The ITLOS seems to equate the phrase "without prejudice" with "shall not prejudice". In the judgment in *Bangladesh/Myanmar*, it observes that "the functions of the Commission are without prejudice to the question of delimitation of the continental shelf between States", *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, [2012] I.T.L.O.S. Rep. 4 100, para. 379 [*Bangladesh/Myanmar*].

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the matters concerning delimitation. This presumption is not always right, as discussed in the following paragraphs of this section, and, more importantly, overlooks the guarantee offered by Article 76(10) of UNCLOS, as discussed in Section D.

The relationship between Paragraph 5(a) and Article 9 is also touched upon by the International Court of Justice (ICJ) in its recent judgments. In its 2016 judgment in *Nicaragua v. Colombia*, the Court observed that although UNCLOS distinguishes between the delineation and delimitation of the OCS, "the two operations may impact upon one another" and that "[t]he CLCS has, in its internal rules (Article 46 and Annex 1), established procedures, *in accordance with Article 9 of Annex II to UNCLOS*, to ensure that its actions do not prejudice matters relating to delimitation" (emphasis added).[43] This *obiter dictum* seems to reflect the first reading of Article 9, which may be interpreted as confirmation from the Court on the accordance of Paragraph 5(a) with Article 9.

However, in its 2017 *Somalia v. Kenya* judgment, while citing the *dictum*, it did not refer to the phrase "in accordance with Article 9". Instead, it stated that: "as the Court has highlighted, 'it is possible that the two operations may impact upon one another' and the rules of the CLCS therefore contain provisions that seek 'to ensure that its actions do not prejudice matters relating to delimitation'".[44] It then observed that Paragraph 5(a) – together with other rules contained in Rule 46 and Annex I – is the approach taken by the CLCS, without mentioning whether it is in accordance with Article 9.[45] The ICJ's view in this judgment is more moderate in the sense that it simply acknowledged the approach of the CLCS and refrained from touching on the question of the accordance of the approach with UNCLOS.

In some cases, the application of Paragraph 5(a) may indeed be detrimental to the question of delimitation by preventing the delimitation from being conducted.[46] As a matter of principle, delimitation only arises if two or more coastal states have overlapping entitlements. In the words of the International Tribunal for the Law of the Sea (ITLO), "[d]elimitation presupposes an area of overlapping entitlements", and thus "the first step in any delimitation is to determine whether there are entitlements and whether they overlap".[47] The establishment of the outer limits of the OCS is to clarify whether the coastal state has the entitlement, and whether that entitlement overlaps with those of other states.

However, when Paragraph 5(a) is applied it blocks the consideration of a submission and thus prevents the establishment of the outer limits of the OCS. As a result, uncertainty remains with regard to the existence and the scope of the entitlement of the coastal state to the OCS. The ITLOS acknowledges that blocking the consideration of the submission at the CLCS by applying Paragraph 5(a) may, in some cases, put a court or tribunal in a position that prevents it from delimitating the OCS.[48] Those are cases in which a court or tribunal concludes that, in the absence of the outer limits of the OCS, "there was significant uncertainty as to the existence of a continental margin in the area in question".[49] In such cases, the application of Paragraph 5(a) would have a detrimental impact upon the delimitation. It creates a deadlock: on the one hand, the existence of a delimitation dispute prevents the CLCS from considering a submission; on the other

[43] *Nicaragua v. Colombia*, *supra* note 23 at 137, para. 113.

[44] *Maritime Delimitation in the India Ocean (Somalia v. Kenya)*, [2017] ICJ Rep 3 at 31, para. 67 [*Somalia v. Kenya*].

[45] *Ibid*, at 31–2, paras. 68–9.

[46] *Ibid*, at 311–5; *Issues with respect to article 4 of Annex II to the United Nations Convention on the Law of the Sea, Background paper prepared by the Secretariat*, Doc. SPLOS/64 (1 May 2001) at 12, para. 46; Sandrine W. DE HERDT, "The Relationship between the Delimitation of the Continental Shelf beyond 200 nm and the Delineation of Its Outer Limits" (2020) 51(3) Ocean Development and International Law 263 at 274–5.

[47] *Bangladesh/Myanmar*, *supra* note 42 at 105, para. 397.

[48] Oude Elferink, *supra* note 9 at 311.

[49] *Bangladesh/Myanmar*, *supra* note 42 at 115, para. 443.

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hand, blocking the CLCS from considering a submission prevents a court or tribunal from settling that delimitation dispute. The consequence is, as noted by the ITLOS, to put all the parties to the dispute "in a position where they may be unable to benefit fully from their rights over the continental shelf".[50]

D. Paragraph 5(a) and Article 76(10) of UNCLOS

As well as Article 9, some commentators have also suggested that Paragraph 5(a) implements Article 76(10) of the Convention.[51] In their view, Article 76(10) and Article 9 have similar rules. However, the two provisions have different meanings.[52] Article 76(10) provides that: "[t]he provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts".

An ordinary reading of the provision indicates that it provides a legal guarantee against any prejudice to the question of delimitation of the continental shelf. This is different from Article 9, which specifically imposes upon the CLCS an active duty not to take any acts that prejudice matters related to delimitation.

The phrase "without prejudice" in Article 76(10) means "without detriment to any existing right or claim".[53] "Detriment" means "the state of being harmed or damaged" or "a cause of harm or damage".[54] Therefore, in accordance with the ordinary meaning of these terms, Article 76(10) provides a safeguard clause guaranteeing that the delineation of the continental shelf shall have no detrimental implication upon the question of delimitation that is pending between the coastal state and other states.

Furthermore, this provision implies that the matter of delineation of the continental shelf as stipulated under Article 76 is distinct from the matter of delimitation, which is exclusively governed by Article 83.[55] The delineation process involving the CLCS is not intended to settle in any way delimitation disputes between states.[56] The jurisprudence of international courts and tribunals confirm that delineation and delimitation are two separate processes.[57] However, the ICJ has repeatedly concluded that, although they are distinct processes, the two may impact upon one another.[58] Article 76(10) thus ensures that any impact created by the delineation process is not detrimental to the question of delimitation. It means the rights of other states that have overlapping entitlements with the coastal state shall not be negatively affected by the application of Article 76 to establish the final and binding outer limits of the OCS via the procedure involving the CLCS.[59] Particularly, the finality and binding effect of the outer limits are not opposable to states that have an entitlement that overlaps with a coastal state.[60] With the

[50] *Ibid*, at 102, para. 392.

[51] Jensen, *supra* note 29 at 66; Bjarni Már MAGNÚSSON, *The Continental Shelf beyond 200 Nautical Miles: Delineation, Delimitation and Dispute Settlement* (Leiden: Brill Nijhoff, 2015) at 98.

[52] Oude Elferink, *supra* note 9 at 306–7.

[53] Oxford English Dictionary Online, *supra* note 38.

[54] *Ibid*, "Detriment", online: Lexico <https://www.lexico.com/definition/detriment>.

[55] Myron H. NORDQUIST, Neal R. GRANDY, Satya N. NANDAN and Shabtai ROSENNE, eds., *United Nations Convention on the Law of the Sea 1982: A Commentary, Vol. II* (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1993) at 883; Oude Elferink, *supra* note 9 at 303.

[56] Oude Elferink and Johnson, *supra* note 28 at 464.

[57] *Bangladesh/Myanmar*, *supra* note 42 at 99, para. 376; *Nicaragua v. Colombia*, *supra* note 23 at 137, paras. 112–13; *Somalia v. Kenya*, *supra* note 44 at 31, para. 67.

[58] *Nicaragua v. Colombia*, at 137, para. 113; *Somalia v. Kenya*, at 31, para. 67.

[59] Alex G. OUDE ELFERINK, "Causes, Consequences, and Solutions relating to the Absence of Final and Binding Outer Limits of the Continental Shelf", in Clive R. SYMMONS, ed., *Selected Contemporary Issues in the Law of the Sea* (Leiden/Boston: Martinus Nihoff Publishers, 2011) 253 at 257.

[60] Oude Elferink and Johnson, *supra* note 28 at 464; Oude Elferink, *supra* note 59 at 257.

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safeguard under Article 76(10), no prejudice may occur that justifies the need for Paragraph 5(a).[61] Consequently, some commentators have suggested that "other states should in principle not object to the consideration of a submission by a coastal state which raises issues of delimitation", because "the consideration of a submission and subsequent recommendation will not prejudice their rights".[62]

The above discussion shows that Paragraph 5(a) overlooks the legal guarantee provided by Article 76(10). The CLCS seems to justify the adoption of the paragraph on the presumption that the consideration of a submission involving an unresolved dispute and the making of recommendations causes harm to the matter related to delimitation, and that the CLCS is under the duty not to take any of such actions.[63] This presumption is legally incorrect. By virtue of Article 76(10), no prejudice may occur from the acts of the CLCS to the question of delimitation of the continental shelf. One commentator has argued that saying "it is without prejudice" does not mean "it is indeed without prejudice", and that the CLCS should take a more cautious approach, as is reflected in Paragraph 5(a).[64] This argument is only correct if the CLCS, by making recommendations, draws a boundary line delimiting the overlapping continental shelf between states. This scenario is unlikely to happen as the CLCS is to make recommendations to coastal states individually. The CLCS is not going to make recommendations on the boundary line between a coastal state and other states. The above discussion indicates that the CLCS overlooks Article 76(10).

In short, since Article 76(10) provides a guarantee that prevents the delineation process from prejudicing the delimitation process between the coastal state and other states, Paragraph 5(a) is not necessary. However, such an unnecessary rule has had a prejudicial impact upon the normal implementation of the delineation process of the OCS involving the CLCS. It creates a deadlock to the process and thus prevents the coastal State from establishing the final and binding outer limits of its OCS. Paragraph 5(a) cannot be justified by Article 76(10).

E. Paragraph 5(a) and Article 76(8) and Article 3(1) of Annex II to UNCLOS

Under Article 76(8), the CLCS has the duty to make recommendations to the coastal state concerning the establishment of the outer limits of the OCS. This duty is enforced by Article 3(1)(a) of Annex II to UNCLOS, which provides that the function of the CLCS is, inter alia, to consider the submission made by the coastal state and to make relevant recommendations. While UNCLOS does not expressly provide for an exception to the duty, Busch argues that Paragraph 5(a) must be considered as such an exception.[65] She explains her view as follows:[66]

> The CLCS is not, however, provided any function in relation to disputes. The CLCS is ascribed only the competence necessary to execute the functions ascribed to it. As it is ascribed no function in relation to disputes, Paragraph 1 of Annex I to the RoP acknowledges that "the competence with respect to matters regarding disputes (...)

[61] Serdy, *supra* note 9 at 365.

[62] Oude Elferink, *supra* note 28 at 283.

[63] Busch, *supra* note 12 at 96; Oude Elferink, *supra* note 9 at 312.

[64] It is Eiriksson's view that "either something prejudices something or it doesn't; saying it isn't so doesn't make it not so". See Gudmundur EIRIKSSON, "The Case of Disagreement between a Coastal State and the Commission on the Limits of the Continental Shelf" in Myron H. NORDQUIST, John N. MOORE and Tomas HEIDAR, eds., *Legal and Scientific Aspects of Continental Shelf Limits* (Leiden/Boston: Martinus Nijhoff Publishers, 2004) 251 at 254.

[65] Busch, *supra* note 12 at 95–8.

[66] *Ibid*.

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> rests with States". Accordingly, the exception to the CLCS's obligation to issue recommendations in relation to OCS submissions follows directly from its ascribed functions, or lack of functions, in accordance with Article 76(8) and Article 1 of Annex II to the LOSC and is not unilaterally introduced by the CLCS. The provisions of Annex I [including Paragraph 5(a)] are implemented to elaborate on the provisions of the LOSC.

On the one hand, the explanation overlooks the distinction between the exercise of the duty and functions of the CLCS as part of the delineation process of the OCS and the settlement of delimitation disputes relating to OCS between states. The duty and function of the CLCS are to recommend the coastal state on how to establish the outer limits of the OCS in accordance with Article 76. As discussed above, by virtue of Article 76(10), the delineation process involving the CLCS does not, at the same time, settle an unresolved delimitation dispute between the states concerned. The outer limits are not the delimitation line. In this regard, Serdy is correct in observing that, as long as the CLCS acts within its technical functions, no prejudice may occur to the question of delimitation.[67]

On the other hand, the right of the CLCS to defer the consideration of a submission involving a dispute under Paragraph 5(a) may directly derive from the duty and functions of the CLCS. If the settlement of a dispute is a prerequisite for the performance of the duty and exercise of the functions of the CLCS, the existence of such an unresolved dispute forms the basis for the CLCS not to make recommendations. That is the case involving a sovereignty dispute between the coastal state and other states over a piece of land that forms the OCS.[68] In this case, it is unknown to the CLCS whether the submission was made by "the coastal state", and which state is "the coastal state". It does not have a duty to make recommendations to a state that is not a coastal state.

For example, and as mentioned above, there remains an unresolved sovereignty dispute between Argentina and the United Kingdom over the Falklands/Malvinas. Both states made submissions in respect of the islands' OCS.[69] In law, there can only be one state that has sovereignty over the islands, which is the only state that can be considered as the coastal state in respect to the OCS. That is the state that has the obligation to make a submission to the CLCS, which is the only submission that will be considered by the CLCS. This is the only state to which the CLCS has a duty to make recommendations. Pending the settlement of the dispute, and without the prior consent of both states, the CLCS may wrongly exercise its functions by considering the submission that is not made by the coastal state, and by making recommendations to a state that is not the coastal state. Logically, the CLCS must have the right to refuse to consider the submission. It is thus directly derived from its duty and functions.

Another type of dispute that requires the CLCS to refuse to consider a submission is a dispute concerning the legal status of an island that generates the OCS subject to the submission. Under UNCLOS, only one type of island has the potential to have an OCS – the so-called "fully-entitled islands" under Article 121(2). Under Article 121(3), a rock that is also an island does not have a continental shelf of its own. When a dispute arises over whether an island is an Article 121(2) island, it is unknown to the CLCS whether there is an OCS, the outer limits of which the CLCS has a duty to make recommendations. Consequently, if it proceeds with the consideration of the submission and then makes

[67] Serdy, *supra* note 9 at 364.

[68] *Ibid*, 366.

[69] The submissions made by Argentina and the United Kingdom in 2009. See United Nations Division for Ocean Affairs and the Law of the Sea, *supra* note 27.

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recommendations, it will perform its duty and exercise its functions on the hypothetical presumption of the existence of an OCS.

It may be argued that the CLCS should not consider a submission if it is unsure that the entitlement exists.[70] Otherwise, it may face an awkward situation if the feature in question turns out later not to be an Article 121(2) island. In practice, the treatment of the CLCS of the submission made by Japan indicates that the CLCS chooses the middle way. Japan made a submission to the CLCS in 2008 in an attempt to extend the proposed outer limits of the continental shelf beyond 200 nautical miles from Okinotorishima – a small group of mid-ocean islands.[71] With this submission, Japan showed that it considered these islands as Article 121(2) islands. However, the view of Japan was opposed by both China and South Korea.[72] They believed that these islands should be considered as rocks that do not generate a continental shelf.[73] They asked the CLCS not to consider the portion of the submission concerning Okinotorishima.[74] The CLCS acknowledged that it was not competent to address the issues concerning the interpretation or application of Article 121.[75] Therefore, it decided to consider the whole submission, but deferred the approval of the parts of the recommendations in respect of Okinotorishima.[76]

It is arguable that the decision to approve certain parts would likely be suspended until the status of the islands was clarified, or at least until China and South Korea withdraw their objections. The approach of the CLCS in this case seems to indicate that if a submission involves a dispute on the legal status of an island, the CLCS shall consider the submission on the hypothesis that it may have an entitlement to an OCS, while not approving the relevant parts of the recommendations. It is not yet clear what the reason was behind this approach.

Another reason for the CLCS not to consider the two kinds of disputes above is that the applicable law of these disputes is not within the interpretative competence of the CLCS. In order to make recommendations in accordance with Article 76, as required under Article 3(1) of Annex II to UNCLOS, it is beyond doubt that the CLCS must be deemed to have the competence to interpret Article 76 so far as it is necessary to discharge its functions.[77] Some argue that, besides Article 76, the CLCS may also have the same

[70] In this regard, it is worth noting the approach of the ITLOS in *Bangladesh/Myanmar*. In this case, both states have not received the recommendations of the CLCS. Therefore, the existence of the entitlement is disputed. Prior to the delineation of the continental shelf beyond 200 nautical miles of both states, the ITLOS is required to examine whether both states have entitlement to the area beyond 200 nautical miles. It notes that the Tribunal "would be hesitant to proceed with the delimitation of area beyond 200 nm had it concluded that there was significant uncertainty as to the existence of a continental shelf margin in the area in question", *Bangladesh/Myanmar*, *supra* note 42 at 115, para. 443.

[71] The Government of Japan, "Japan's Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea: Executive Summary" (12 November 2008), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/jpn_execsummary.pdf>.

[72] Permanent Mission of China to the United Nations, "Note verbale dated 6 February 2009 by the Permanent Mission of China to the United Nations addressed to the United Nations Secretary-General (English trans.)" (February 2009), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/chn_6feb09_e.pdf>; Permanent Mission of South Korea to the United Nations, "Note verbale dated 27 February 2009 by the Permanent Mission of South Korea to the United Nations addressed to the United Nations Secretary-General" (February 2009), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/kor_27feb09.pdf>.

[73] *Ibid*.

[74] *Ibid*.

[75] *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission*, Doc. CLCS/62 (20 April 2009), at 12, para. 59.

[76] *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission*, Doc. CLCS/64 (1 October 2009), at 8, para. 26.

[77] Busch, *supra* note 12 at 1812.

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competence with respect to other provisions of UNCLOS to the extent that it is necessary to carry its functions[78] such as those contained in Annex II to UNCLOS.[79] If the subject matter of the dispute involves these provisions, the CLCS may interpret them to the extent that is necessary for it to consider the submission concerned and make recommendations. This should not be interpreted as settling the dispute in question, but rather as merely exercising the functions of the CLCS. If the subject matter of the dispute involves legal rules that are beyond the interpretative competence of the CLCS, the presence of the dispute remains a bar for the CLCS to perform its duty and exercise its functions because the settlement of the dispute is a prerequisite for the CLCS to do so. Examples of this type of dispute include disputes concerning territorial sovereignty or the legal status of an island. The CLCS has indeed acknowledged that it has no competence to interpret Article 121.[80]

In sum, directly deriving from the duty and functions of the CLCS, the CLCS must have the right not to consider a submission involving a dispute if it satisfies two conditions: (i) the settlement of the dispute is a prerequisite for the CLCS to perform its duty and to exercise its function, and that (ii) the CLCS has no interpretative competence in respect to the applicable law of these disputes. The above discussion may also justify the fact that Paragraph 5(a) applies to submissions involving land or maritime disputes other than delimitation disputes.[81]

The discussions contained in the above Sections C to E show that Paragraph 5(a) is not fully in accordance with Article 76(10) and Article 9 of Annex II to UNCLOS. It may be in accordance with the duty and functions of the CLCS as stipulated in Article 76(8) and Article 3 of Annex II to UNCLOS in the case of submissions involving an unresolved dispute, the settlement of which is a prerequisite for the CLCS to perform its duty and exercise its functions. Examples of such disputes include circumstances where there is a sovereignty dispute over land territory that generates the OCS, or a dispute concerning the legal status of an island that generates the OCS. This conclusion does not mean that, except for these types of disputes, the application of Paragraph 5(a) in the case of other disputes is not in accordance with UNCLOS. As shown below, the attitude of states parties toward the paragraph offers a potential justification.

F. Paragraph 5(a) and the Attitude of States Parties: Interpretation by Subsequent Practice?

Oude Elferink has suggested that Paragraph 5(a) may be considered as an interpretation by subsequent practice under Article 31(3) of the 1969 Vienna Convention on the Law of Treaties.[82] The International Law Commission (ILC) has observed that subsequent practice may result in "narrowing, widening, or otherwise determining the range of possible

[78] Alex G. OUDE ELFERINK, "The Continental Shelf beyond 200 Nautical Miles: Relationship between the CLCS and Third Party Dispute Settlement" in Alex G. OUDE ELFERINK and Donald R. ROTHWELL, eds., *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (Leiden/Boston: Martinus Nihoff Publishers, 2004), 107 at 111; International Law Association's Committee on the Legal Issues of the Outer Continental Shelf, *First Report* (2004) at 5; Magnússon, *supra* note 51 at 47–9.

[79] Harald BREKKE and Philip SYMONDS, "Submarine Ridges and Elevations of Article 76 in Light of Published Summaries of Recommendations of the Commission on the Limits of the Continental Shelf" (2011) 42(4) Ocean Development and International Law 289 at 290.

[80] *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission*, Doc. CLCS/62 (20 April 2009), at 12, para. 59.

[81] The other justification may be that Article 9 of Annex II to UNCLOS refers to "matters relating to delimitation of boundaries" which covers other matters than those directly relates to delimitation. See Oude Elferink, *supra* note 59 at 256–7.

[82] Oude Elferink, *supra* note 9 at 314–5.

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interpretations".[83] To this effect, Paragraph 5(a) may be considered as the interpretation that widens the meaning of Article 9 of Annex I to UNCLOS and, possibly, also Article 76 (10), despite the fact that the above discussion indicates that the paragraph is not fully in accordance with both provisions. The condition for the paragraph to be considered as an interpretation by the subsequent practice of states parties to UNCLOS is that the practice must establish that the paragraph reflects "the agreement of the parties regarding its interpretation".[84] In the case of Paragraph 5(a), such an agreement seems to be established by the absence of objections from states parties for more than twenty years from the date it was adopted. As noted above, the paragraph has been invoked to block, wholly or partly, the consideration of twenty-five submissions. No state has ever raised an objection to the paragraph itself. This includes the coastal states that made those submissions; they objected to the *application* of the paragraph to block the consideration of their submissions but did not object to the *existence* of the paragraph itself. In some cases, they actively confirmed their ongoing attempt to obtain consent from other parties to the dispute. For example, in the executive summary of the joint submission made by Malaysia and Vietnam, both states confirmed that there was an unresolved dispute over the area subject to the submission and that they have undertaken efforts, unsuccessfully, to secure the non-objection of the other relevant coastal states.[85]

However, by referring to the assurance under Paragraph 5(a) of Annex I to the RoP that the joint submission is without prejudice to the position of any party to a land or maritime dispute, they requested the CLCS to consider the joint submission.[86] In the presentation of the joint submission before the CLCS, the representatives of Malaysia and Vietnam reportedly emphasized that "the submission was without prejudice to the question of delimitation between States and that paragraph 5(a) of annex I of the rules of procedure should not be invoked".[87] The statement indicates that both states did not object to Paragraph 5(a), but objected to its invocation by other states to block the consideration of the submission.

In another case, the coastal state clearly supported the invocation of Paragraph 5(a) by another state to block the consideration of its submission. For example, in the executive summary of the submission made by France in 2014, in respect of the area of Saint-Pierre-et-Miquelon, Canada invoked Paragraph 5(a) to block the consideration of the submission. France recognized that there was an unresolved maritime dispute between itself and Canada over the area subject to the submission. At the same time, "France endorses, with a view to its application", Paragraph 5(a).[88] The absence of an objection to Paragraph 5(a) indicates that there is likely an agreement between states

[83] International Law Commission, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties* (2018), Conclusion 7(1).

[84] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 (entered in force on 27 January 1980), art. 31(1)(3)(b).

[85] The Government of Malaysia and the Government of the Socialist Republic of Vietnam, "Joint Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea 1982 in respect of the southern part of the South China Sea, Part I: Executive Summary" (May 2009), online: UN <https://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/mys_vnm2009excutivesummary.pdf>.

[86] *Ibid*.

[87] *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission*, CLCS/64 (1 October 2009), at 19, para. 91.

[88] France, "The French Continental Shelf: Partial Submission to the Commission on the Limits of the Continental Shelf, pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea in respect of the area of Saint-Pierre-et-Miquelon: Part 1: Executive Summary (English Translation of the French Original)", (16 April 2014), online: UN <https://www.un.org/depts/los/clcs_new/submissions_files/fra72_14/SPM_Summary_EN_April2014.pdf>.

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parties to accept Paragraph 5(a) as the interpretation of Article 9 of Annex II to UNCLOS. This conclusion is further cemented when looking into the drafting history of Paragraph 5 (a). No objection of states parties to the paragraph was recorded when the draft paragraph was submitted to the ninth Meeting of States Parties (SPLOS) for feedback.[89] The report of the eighth SPLOS shows that no state objected to the draft Paragraph 5(a).[90]

In addition, Paragraph 5(a) may be also be considered as a tacit modification to UNCLOS by subsequent practice.[91] However, in international law, the question of whether subsequent practice may modify a treaty remains controversial. Some commentators argue that a treaty may be modified by subsequent practice.[92] Others disagree.[93] It is beyond the scope of this article to examine which view better reflects contemporary international law. Therefore, the question of whether Paragraph 5(a) can be considered as a modification to UNCLOS does not have a definite answer.

III. A Proposal for an Alternative Approach

While Paragraph 5(a) as a whole may be considered as the interpretation of Article 9 of Annex II to UNCLOS, it is beyond doubt that the application of the paragraph has had a significant impact on the delineation process of the OCS by coastal states around the world. As a consequence, it delays the realization of one of the objects and purposes of UNCLOS, which is to create certainty about the outer limits of the continental shelf and thus the limits of the area. This gives rise to the question of whether there might be an alternative approach that has a lesser impact on this process than the current Paragraph 5(a). It is submitted that the answer is in the affirmative.

A. Paragraph 5(a) Should Not Apply to Submissions Involving Delimitations Disputes

As shown in the discussion in Section D, Article 76(10) provides a legal guarantee to ensure that the delineation process involving the CLCS shall not prejudice the delimitation process. This guarantee is sufficient to protect the rights of other states that have an entitlement to the area subject to the submission made by a coastal state. Furthermore, the completion of the delineation process involving the CLCS brings certainty to the extent of the overlapping area and thus facilitates the delimitation process.[94] With the existence of the guarantee under Article 76(10) and the benefits of completing the delineation process, it is submitted that Paragraph 5(a) is not necessary to cover

[89] *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of the work in the Commission*, CLCS/4 (17 September 1997), at 2, para. 11.

[90] *Ibid*, at 11–2, paras. 46–9.

[91] Irina BUGA, "Between Stability and Change in the Law of the Sea Convention: Subsequent Practice, Treaty Modification, and Regime Interaction" in Donald ROTHWELL, Alex OUDE ELFERINK, Karen SCOTT and Tim STEPHENS, eds., *The Oxford Handbook of the Law of the Sea* (Oxford: Oxford University Press, 2015) 46 at 66; Irina BUGA, *Modification of Treaties by Subsequent Practice* (Oxford: Oxford University Press, 2018) at 189.

[92] *Ibid*; Philippe SANDS, "Article 39" in Olivier CORTEN and Pierre KLEIN, eds., *The Vienna Conventions on the Law of Treaties* (Oxford: Oxford University Press 2011), 962 at 973, para. 36; James CRAWFORD, *Brownlie's Principles of Public International Law*, 9th ed. (Oxford: Oxford University Press 2019) at 372.

[93] In a recently adopted document, the International Law Commission observed that "while there exists some support in international case law that, absent indications in the treaty to the contrary, the agreed subsequent practice of the parties theoretically may lead to modifications of a treaty, the actual occurrence of that effect is not to be presumed, and the possibility of amending or modifying a treaty by subsequent practice has not been generally recognized". See International Law Commission, *Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties, with commentaries*, A/73/10 (2018), 16 at 63, para. 38.

[94] *Bangladesh/Myanmar*, *supra* note 42 at 102, para. 392.

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submissions involving delimitation disputes. It should be thus modified to exclude this type of disputes.

The above proposal is supported by the practice of how other states responded toward submissions made by a coastal state that concerned a delimitation dispute only. The majority of states gave consent to the consideration of those submissions. When doing so, some made an explicit reference to Article 76(10); for example, India,[95] New Zealand,[96] Fiji,[97] Tonga,[98] France,[99] Pakistan,[100] Oman,[101] Indonesia,[102] Portugal,[103] Mexico,[104] and Morocco.[105] Some did not explicitly refer to Article 76(10) but repeated the wording of the provision; for example, Timor-Leste,[106] Iceland,[107] Suriname,[108]

[95] Permanent Mission of India to the United Nations, "Note verbale dated 25 March 2009 by the Permanent Mission of India to the United Nations addressed to the Secretary-General of the United Nations" (March 2009), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/idn08/clcs12_2008_ind_e.pdf>.

[96] Permanent Mission of New Zealand to the United Nations, "Note verbale dated 29 June 2009 by the Permanent Mission of New Zealand to the United Nations addressed to the Secretary-General of the United Nations" (June 2009), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/cok23_09/cok23_nzl29jun09.pdf>.

[97] Permanent Mission of Fiji to the United Nations, "Note verbale dated 23 June 2006 by the Permanent Mission of Fiji to the United Nations addressed to the Secretary-General of the United Nations" (June 2006), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/nzl06/fiji_e.pdf>.

[98] Permanent Mission of Tonga to the United Nations, "Note verbale dated 8 April 2008 by the Permanent Mission of Tonga to the United Nations addressed to the Secretary-General of the United Nations" (April 2008), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/nzl06/tonga_e.pdf>.

[99] Permanent Mission of France to the United Nations, "Note verbale dated 13 July 2006 by the Permanent Mission of France to the United Nations addressed to the Secretary-General of the United Nations" (July 2006), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/nzl06/france_f.pdf>.

[100] Permanent Mission of Pakistan to the United Nations, "Note verbale dated 9 October 2014 by the Permanent Mission of Pakistan to the United Nations to the United Nations Secretariat" (October 2014), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/pak29_09/2014_10_09_PAK_NV_UN_003_14-00794.pdf>.

[101] Permanent Mission of Oman to the United Nations, "Note verbale dated 10 November 2014 by the Permanent Mission of Oman to the United Nations addressed to the Secretary-General of the United Nations" (November 2014), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/idn08/clcs12_2008_ind_e.pdf>.

[102] Permanent Mission of Indonesia to the United Nations, "Note verbale dated 30 April 2009 by the Permanent Mission of Indonesia to the United Nations addressed to the Secretary-General of the United Nations" (April 2009), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/idn08/clcs12_2008_idn_e.pdf>.

[103] Permanent Mission of Portugal to the United Nations, "Note verbale dated 28 May 2009 by the Permanent Mission of Portugal to the United Nations addressed to the Secretary-General of the United Nations" (May 2009), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/esp47_09/prt_re_esp2009.pdf>.

[104] Permanent Mission of Mexico to the United Nations, "Note verbale dated 21 August 2009 by the Permanent Mission of Mexico to the United Nations addressed to the Secretary-General of the United Nations" (August 2009), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/cub51_09/mex_re_cub_clcs51_e.pdf>.

[105] Permanent Mission of Morocco to the United Nations, "Note verbale dated 10 March 2015 by the Permanent Mission of Morocco to the United Nations addressed to the Secretary-General of the United Nations" (March 2015), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/esp77_14/mor_-re_esp77_eng.pdf>.

[106] Permanent Mission of Timor-Leste to the United Nations, "Note verbale dated 8 April 2008 by the Permanent Mission of Timor-Leste to the United Nations addressed to the Secretary-General of the United Nations" (April 2008), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/aus04/clcs_03_2004_los_tls.pdf>.

[107] Permanent Mission of Iceland to the United Nations, "Note verbale dated 24 August 2005 by the Permanent Mission of Iceland to the United Nations addressed to the Secretary-General of the United Nations" (August 2005), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/irl05/clcs_04_2005_isl.pdf>.

[108] Permanent Mission of Suriname to the United Nations, "Note verbale dated 7 August 2008 by the Permanent Mission of Suriname to the United Nations addressed to the Secretary-General of the United Nations" (August 2008), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/brb08/sur_aug_2008.pdf>.

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Barbados,[109] Trinidad and Tobago,[110] and the United Kingdom.[111] Tonga,[112] France,[113] Pakistan,[114] Oman,[115] Indonesia,[116] Portugal,[117] Mexico,[118] and Morocco.[119] Some did not explicitly refer to Article 76(10) but repeated the wording of the provision; for example, Timor-Leste,[120] Iceland,[121] Suriname,[122] Barbados,[123] Trinidad and Tobago,[124] and the

[109] Permanent Mission of Barbados to the United Nations, "Note verbale dated 31 July 2009 by the Permanent Mission of Barbados to the United Nations addressed to the Secretary-General of the United Nations" (July 2009), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/sur08/brb_re_sur_clcs15.pdf>.

[110] Permanent Mission of Trinidad and Tobago to the United Nations, "Note verbale dated 29 April 2009 by the Permanent Mission of Trinidad and Tobago to the United Nations addressed to the Secretary-General of the United Nations" (April 2009), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/sur08/tto_re_sur_2009.pdf>.

[111] Permanent Mission of the United Kingdom to the United Nations, "Note verbale dated 9 August 2010 by the Permanent Mission of the United Kingdom to the United Nations addressed to the Secretary-General of the United Nations" (August 2010), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/mdv53_10/gbr_re_mdv_2010.pdf>.

[112] Permanent Mission of Tonga to the United Nations, "Note verbale dated 8 April 2008 by the Permanent Mission of Tonga to the United Nations addressed to the Secretary-General of the United Nations" (April 2008), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/nzl06/tonga_e.pdf>.

[113] Permanent Mission of France to the United Nations, "Note verbale dated 13 July 2006 by the Permanent Mission of France to the United Nations addressed to the Secretary-General of the United Nations" (July 2006), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/nzl06/france_f.pdf>.

[114] Permanent Mission of Pakistan to the United Nations, "Note verbale dated 9 October 2014 by the Permanent Mission of Pakistan to the United Nations to the United Nations Secretariat" (October 2014), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/pak29_09/2014_10_09_PAK_NV_UN_003_14-00794.pdf>.

[115] Permanent Mission of Oman to the United Nations, "Note verbale dated 10 November 2014 by the Permanent Mission of Oman to the United Nations addressed to the Secretary-General of the United Nations" (November 2014), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/idn08/clcs12_2008_ind_e.pdf>.

[116] Permanent Mission of Indonesia to the United Nations, "Note verbale dated 30 April 2009 by the Permanent Mission of Indonesia to the United Nations addressed to the Secretary-General of the United Nations" (April 2009), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/idn08/clcs12_2008_idn_e.pdf>.

[117] Permanent Mission of Portugal to the United Nations, "Note verbale dated 28 May 2009 by the Permanent Mission of Portugal to the United Nations addressed to the Secretary-General of the United Nations" (May 2009), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/esp47_09/prt_re_esp2009.pdf>.

[118] Permanent Mission of Mexico to the United Nations, "Note verbale dated 21 August 2009 by the Permanent Mission of Mexico to the United Nations addressed to the Secretary-General of the United Nations" (August 2009), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/cub51_09/mex_ re_cub_clcs51_e.pdf>.

[119] Permanent Mission of Morocco to the United Nations, "Note verbale dated 10 March 2015 by the Permanent Mission of Morocco to the United Nations addressed to the Secretary-General of the United Nations" (March 2015), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/esp77_14/mor_-re_esp77_eng.pdf>.

[120] Permanent Mission of Timor-Leste to the United Nations, "Note verbale dated 8 April 2008 by the Permanent Mission of Timor-Leste to the United Nations addressed to the Secretary-General of the United Nations" (April 2008), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/aus04/clcs_03_2004_los_tls.pdf>.

[121] Permanent Mission of Iceland to the United Nations, "Note verbale dated 24 August 2005 by the Permanent Mission of Iceland to the United Nations addressed to the Secretary-General of the United Nations" (August 2005), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/irl05/clcs_04_2005_isl.pdf>.

[122] Permanent Mission of Suriname to the United Nations, "Note verbale dated 7 August 2008 by the Permanent Mission of Suriname to the United Nations addressed to the Secretary-General of the United Nations" (August 2008), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/brb08/sur_aug_2008.pdf>.

[123] Permanent Mission of Barbados to the United Nations, "Note verbale dated 31 July 2009 by the Permanent Mission of Barbados to the United Nations addressed to the Secretary-General of the United Nations" (July 2009), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/sur08/brb_re_sur_clcs15.pdf>.

[124] Permanent Mission of Trinidad and Tobago to the United Nations, "Note verbale dated 29 April 2009 by the Permanent Mission of Trinidad and Tobago to the United Nations addressed to the Secretary-General of the

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United Kingdom.[125] Some states concluded an agreement in which they reassured one another that consideration of the submission by the CLCS, and its subsequent recommendations, shall not prejudice the question of delimitation.[126]

If submissions involving delimitation disputes are excluded from the scope of application of Paragraph 5(a), the CLCS will be enabled to consider more submissions, especially those that only involve a delimitation dispute such as the submissions made by Yemen, Fiji, or Palau. These are submissions where the reactions from other states only raised the issue of maritime delimitation.

B. Submissions Involving Other Land or Maritime Disputes

The discussions in Section E indicate that Paragraph 5(a) should cover disputes, the settlement of which is a prerequisite for the CLCS to perform its duty and exercise its functions. They include a sovereignty dispute over land territory that generates the OCS subject to the submission, or the dispute concerning the legal status of an island that generates the OCS subject to the submission. There may be other disputes of similar nature such as a dispute concerning the validity of baselines.[127] The CLCS should develop a test to identify such types of disputes. If other states wish to block the consideration of a submission due to the presence of an unresolved dispute, they should be required to provide an explanation as to how the settlement of the dispute concerned is a prerequisite for the CLCS to perform its duty and exercise its functions. The test may be added to Paragraph 5(a).

United Nations" (April 2009), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/sur08/tto_re_sur_2009.pdf>.

[125] Permanent Mission of the United Kingdom to the United Nations, "Note verbale dated 9 August 2010 by the Permanent Mission of the United Kingdom to the United Nations addressed to the Secretary-General of the United Nations" (August 2010), online: UN <https://www.un.org/Depts/los/clcs_new/submissions_files/mdv53_10/gbr_re_mdv_2010.pdf>.

[126] For example, the Agreed Minutes signed by the Ministers of Foreign Affairs of Denmark, Norway and Iceland together with the Prime Minister of Faroes on the delimitation of the continental shelf in the southern part of the Banana Hole of the Northeast Atlantic (2006); the Agreed Minutes between Iceland, Denmark (Faroe Islands) and Norway on the delimitation of the continental shelf beyond 200 nautical miles in the Ægir Basin area (2006); the Memorandum of Understanding between Kenya and Somalia to grant to each other no-objection in respect of submission to the Commission on the Limits of the Continental shelf (2009); the Agreement between Tanzania and Seychelles concerning the Consideration of Submissions to the United Nations Commission on the Limits of the Continental Shelf; the Exchange of Notes dated 15 March 2012 between Denmark and Canada concerning the submissions in the Labrador Sea (2012); the Agreed Minutes between Denmark and Iceland on the Delimitation of the Continental Shelf beyond 200 nautical miles in the Irminger Sea (2013); the agreement between Benin, Côte d'Ivoire, Ghana, Nigeria and Togo (2009). The executive summaries of the submissions made by several states also indicate that they reached a non-objection agreement such as the agreements to not object the consideration of their submissions in respect of the Arctic Ocean between Russia-Denmark (Greenland) and Russia-Canada; the agreement between Suriname and France, Barbados, Guyana, Trinidad and Tobago and Venezuela; and the agreement between Sri Lanka and India. Similar agreements were also reached after the submission was made, for example, the agreement between Micronesia and Palau (2019), and the agreement between Pakistan and Oman.

[127] The location of baselines is an essential factor during the consideration of the submission by the CLCS (*Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf*, Doc. CLCS/11 (13 May 1999), at 28–30). However, the CLCS itself recognizes that it is not empowered by the CLCS to consider whether the baselines are determined in accordance with UNCLOS (*ibid.*). This means that if a dispute exists between the coastal State and other state on the validity of baselines, the CLCS is unable to consider the submission and to formulate recommendations. Until now, although disputes concerning the validity of baselines are not uncommon, no submission has been subject to a deferral under Paragraph 5(a) due to the existence of such disputes.

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One may argue that as a technical body composed of scientists, not lawyers,[128] the CLCS may face difficulties in evaluating the test. It is true that members of the CLCS are not required to have legal expertise, and in practice few members of the CLCS have such expertise.[129] However, this should not be a bar for the CLCS to determine whether a dispute involving a submission is required to be settled before the CLCS can consider the submission.

The first reason is that the RoP allows the CLCS to seek external advice from specialists.[130] The CLCS may request legal advice to assist it to make the determination. In this regard, it should be noted that the CLCS has in the past asked for legal advice from the Legal Counsel of the United Nations on the privileges and immunities of its members,[131] the procedure to deal with the breach of confidentiality rules,[132] and the possibility of submitting additional information by a coastal state during the consideration of its submission.[133] While the question of whether legal counsel should assist the CLCS in determining the applicability of Paragraph 5(a) and the procedure to seek legal advice from other specialists may need to be further examined, at least, the RoP do offer a basis for the CLCS to seek external legal advice.

The second reason why the CLCS's lack of legal expertise does not prevent the proposed modification is that the CLCS is not a court of law,[134] but a recommendatory body. Whatever it recommends does not have a legally-binding effect upon the states concerned. What the CLCS is required to do is to use its best efforts to evaluate the information that it has at hand concerning the dispute with or without assistance from external advice.

While the lack of legal expertise should not be a reason for not modifying Paragraph 5(a), the attitude of states parties is likely the most significant obstacle. As noted above, the paragraph has the general support of states parties. During more than twenty years of its application, no objection has been recorded. Even the coastal states that have had their submissions blocked by the paragraph have not objected to the paragraph itself. Any attempt to modify Paragraph 5(a) may face pushback from states parties, particularly those states that invoked Paragraph 5(a) to block the consideration of a submission. They may go against a modification if the outcome removes the effect of their invocation in the past.[135]

However, if states parties conclude that the proposed modification to the paragraph does not affect their rights and brings more benefits than the current Paragraph 5(a), they may support such modifications. It is quite clear that the proposed modifications will allow the CLCS to consider more submissions and thus contribute to removing

[128] *UNCLOS*, Annex II, art. 2(2).

[129] Among 59 experts who have been currently or formerly members of the Commission, all have expertise on natural sciences such as geology, geophysics, or hydrography; very few among them have a degree on law (Mr. Yuri Borisovitch Kazmin (Russia) and Mr. De Landro-Clarke, Wanda-Lee (Trinidad and Tobago).

[130] *RoP*, Rule 57.

[131] *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of the work in the Commission*, Doc. CLCS/4 (17 September 1997), at 4, para. 19.

[132] *Letter dated 15 March 1999 from the Chairman of the Commission on the Limits of the Continental Shelf addressed to the Legal Counsel, Under-Secretary-General of the United Nations for Legal Affairs*, Doc. CLCS/13 (18 May 1999).

[133] *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of the work in the Commission*, Doc. CLCS/44 (3 May 2005), at 3, para. 13.

[134] L. D. M. NELSON, "The Continental Shelf: Interplay of Law and Science" in Nisuke ANDO, Edward MCWHINNEY, Rüdiger WOLFRUM and Betsy Baker Röben, eds., *Liber Amicorum Judge Shigeru Oda*, Vol. II (The Hague/London/New York: Kluwer Law International, 2002), 1235 at 1238.

[135] It is likely that before the official adoption of any modification to the Paragraph, the CLCS will submit the draft to the Meeting of States Parties for feedback. This was the way it did when it adopted the current Paragraph 5(a). All states parties will have a chance to express their views.

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legal uncertainty in more areas in the world's oceans and seas. Moreover, it also contributes to the realization of one of the objects and purposes of UNCLOS – that is to create legal certainty about the outer limits of the continental shelf and thus the limits of the area. Furthermore, the proposed modification of Paragraph 5(a) would not be intended to completely remove the right to block the consideration of a submission involving an unresolved dispute. The other states still retain such a right, but are subject to certain conditions.

IV. Conclusion

Paragraph 5(a) has had a multifaceted impact on the implementation of the delineation process of the OCS that involves the CLCS. It confers on the CLCS the power not to perform its duty to consider the submission made by a coastal state and to make relevant recommendations. It also confers upon other states the right to block the consideration of a submission due to the presence of an unresolved dispute between them and the coastal state. At the same time, it imposes upon the coastal state a requirement to obtain the consent of other parties to the dispute in order to have its submission considered by the CLCS. These are new factors that were not envisaged by UNCLOS. The consequences are that in some areas of the world's oceans and seas the outer limits of the OCS may not be established, and thus the limits of the area may not be definitely determined. It goes against one of the key objects and purposes of UNCLOS – that is, to bring certainty about the extent of the continental shelf and the limits of the area.

Against this background, the paper examines whether Paragraph 5(a) operates in accordance with UNCLOS. On the one hand, the paragraph is not fully in accordance with Article 76(10) and Article 9 of Annex II to UNCLOS, both of which have the same object; that is, to prevent the delineation process under Article 76 from prejudicing the delimitation process. On the other hand, the duty and functions of the CLCS may require the CLCS not to consider a submission that involves a dispute that satisfies two conditions: (i) the settlement of the dispute is a prerequisite to the performance of its duty and the exercise of its functions, and (ii) the CLCS does not have the interpretative competence over the applicable law of the dispute. Examples of these disputes are sovereignty disputes concerning a piece of land that generates the OCS or disputes concerning the legal status of an island that generates the OCS. However, the consistent support of states parties toward Paragraph 5(a) seems to constitute subsequent practice to establish an agreement that considers the paragraph as an interpretation of Article 9 of Annex II to UNCLOS. The support is also seen from coastal states that have had their submissions deferred by the CLCS due to objections received from other states on the basis of Paragraph 5(a).

Although states parties to UNCLOS may consider Paragraph 5(a) to be an interpretation of Article 9, the significant impact of Paragraph 5(a) on the implementation of the delineation process gives rise to the question of whether there is an alternative approach that has a more limited impact. It is proposed that Paragraph 5(a) should be modified to exclude delimitation disputes because the rights of other states are sufficiently protected by Article 76(10). The Paragraph should be also modified to include a test to determine which disputes that their presence may be the basis for blocking the consideration of a submission. The test should limit the disputes to those that, the settlement of which, form a prerequisite by which the CLCS can perform its duty and exercise its functions. These proposals may, hopefully, receive the support of states parties as they would contribute to the realization of the objects and purposes of UNCLOS to create certainty about the limits of the continental shelf and the area.

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