

The Limits of the Continental Shelf Established **Not** on the Basis of the Recommendations of the CLCS: A Case Study

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the facts

in 2008 Japan made its submissions to CLCS regarding the outer limits of its extended CS. After 4 years of deliberation the CLCS provided its recommendations in 2012, part of which are here

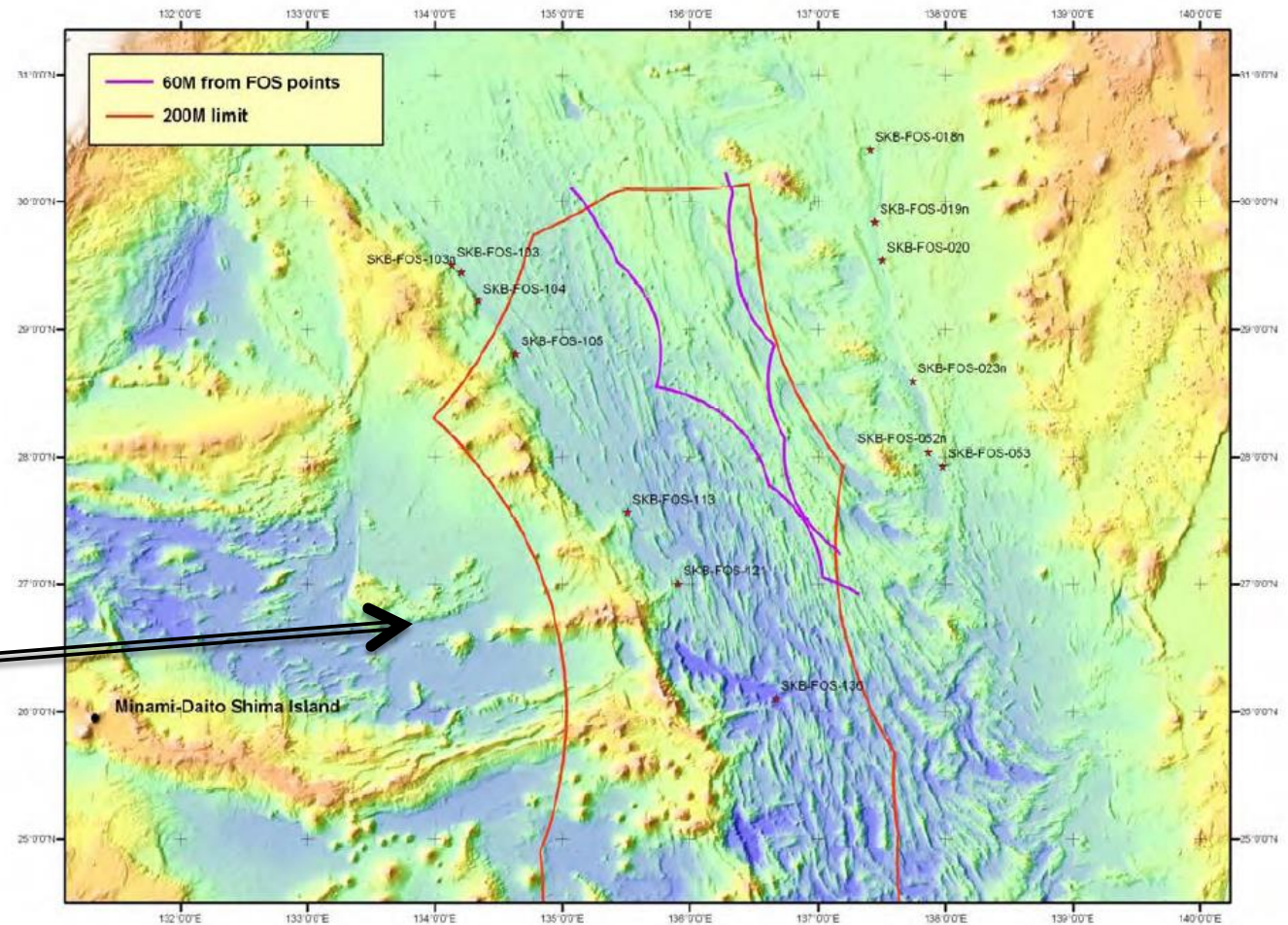
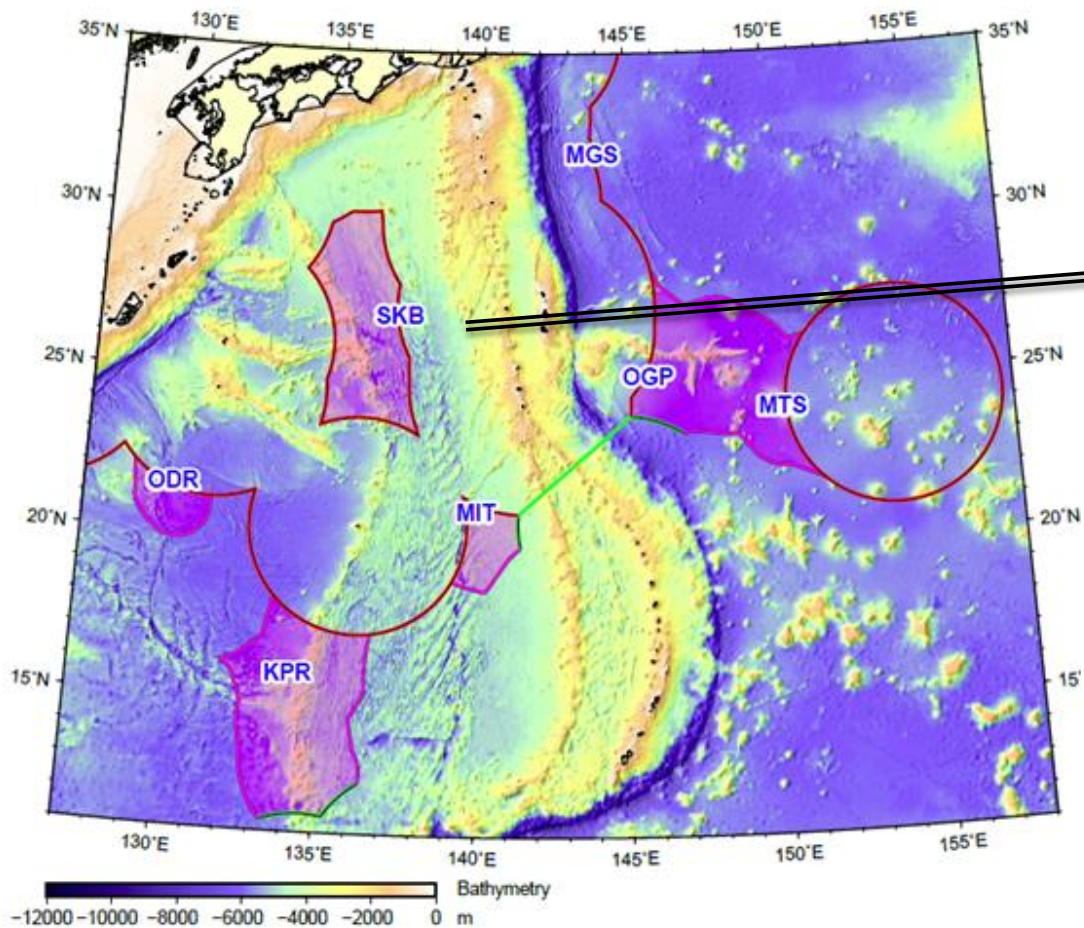
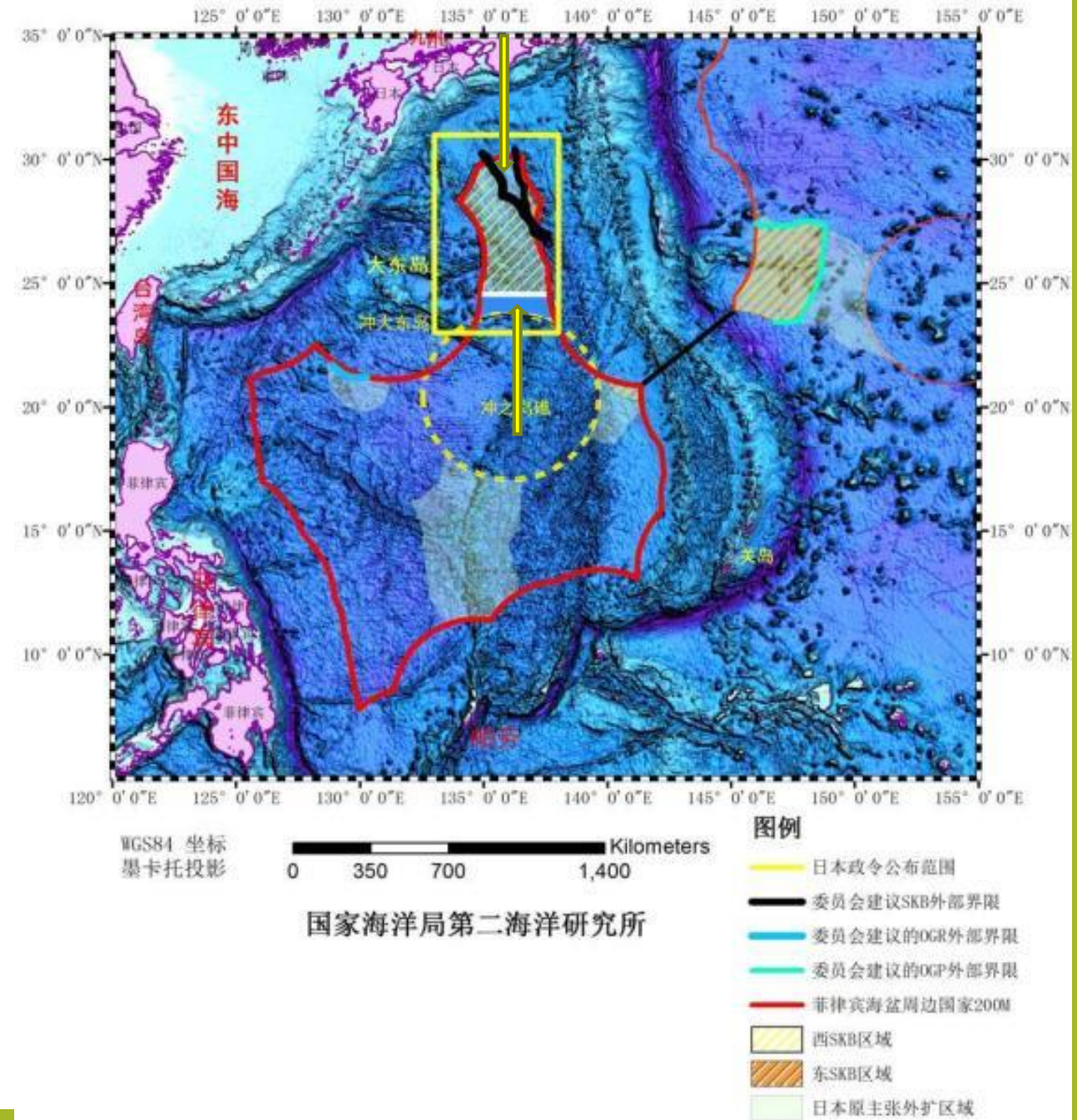
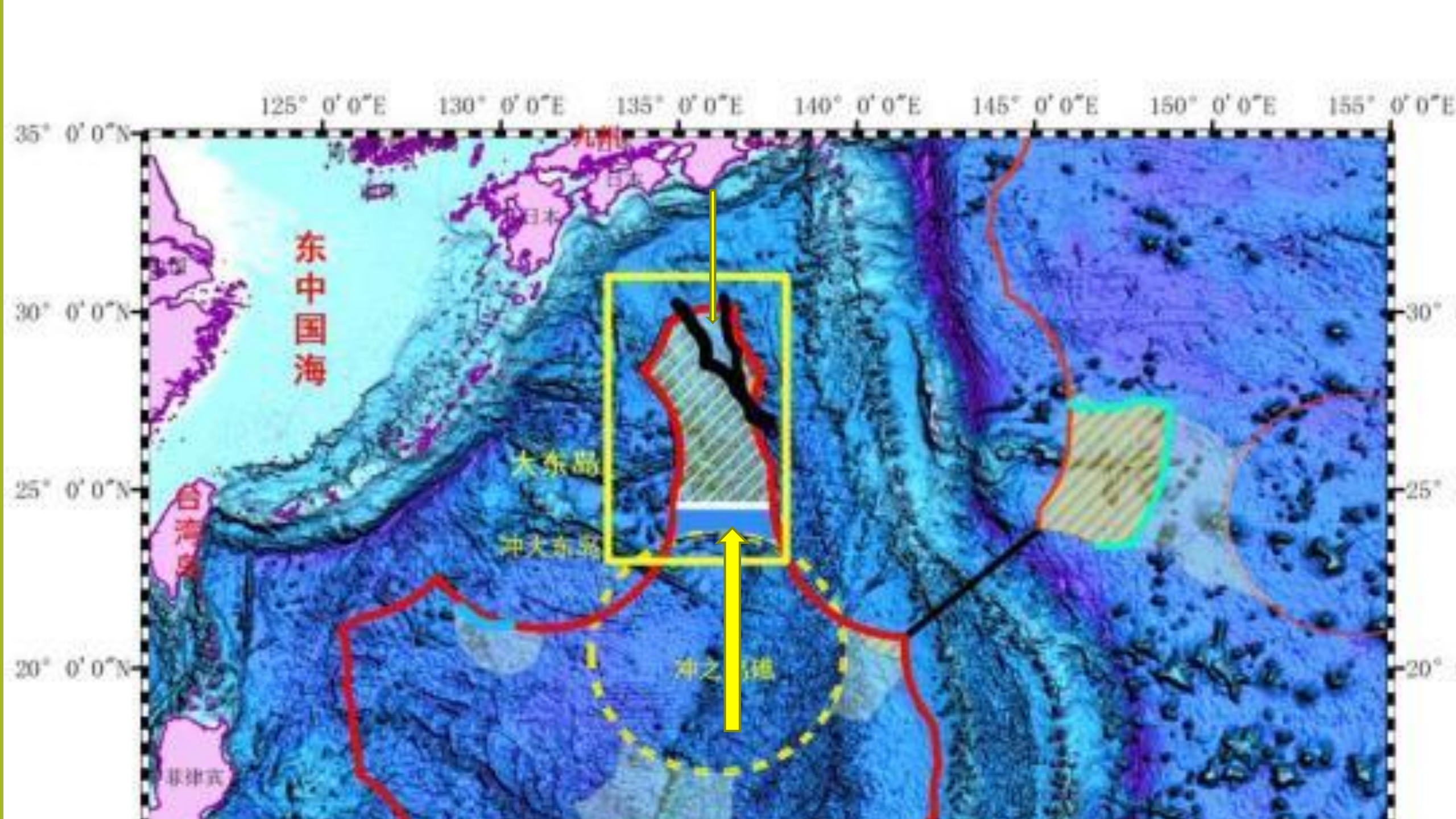


Figure 27. Bathymetric map showing outer edge formula lines in the Shikoku Basin Region.

Japan's 2014 Decree (No. 302) on EEZ and CS

- On 12 Sep. 2014, Japan's cabinet promulgated the Decree no. 302
- under Art 2(2) of Japan's EEZ and CS Act
- It provides part of Japan's outer CS.
- In the rectangular area everything beyond Japan's EEZ is claimed as its outer CS beyond 200 nm.
- Clearly, Decree 302 went beyond the 2012 recommendations of the CLCS.
- Legality issues under Art 76(8) of UNCLOS arise from two areas of outer CS inside the rectangular area.





the law

Art. 76(8) of UNCLOS

- Information on the limits of the continental shelf beyond 200 nautical miles from the baselines ... *shall be submitted* by the coastal State to the CLCS
- The Commission *shall make recommendations* to coastal States on matters related to the establishment of the outer limits of their continental shelf.
- The limits of the shelf established by a coastal State *on the basis of* these recommendations shall be final and binding.

- Questions:

- **What happens if a coastal State establishes the limits of its outer continental shelf *not on the basis of* the recommendations of the CLCS?**
- **What does it mean by “on the basis of”?**
- **Is the coastal State bound not to go beyond what the recommendations specify?**
- **May the coastal State claim CS less than what the recommendations specify?**

two kinds of situations

- **Situation One: the recommendations of the Commission exist,**
 - but the limits of the outer continental shelf are not established on the basis of such recommendations
- **Situation Two: the recommendations of the Commission do not exist,**
 - while the coastal State goes ahead by establishing the limits of its outer continental shelf
- what if the recommendations prepared by the **subcommission** do exist, but the Commission has not approved the recommendations...
 - should this fall within **Situation One or Two?**
 - perhaps **Situation Two, why?**
 - because the distinction between recommendations of the Commission and the recommendations prepared by or drafted by the subcommission is consistently made by all the relevant documents of the CLCS
 - See Annex II to UNCLOS, Rules of Procedure of the Commission

Situation One

- the Commission has provided the recommendations, but the limits established by the coastal State are not on the basis of the recommendations
- What does it mean by “on the basis of”?
- Is the coastal State *legally bound to strictly follow* the recommendations of the Commission for its establishment of the limits of the outer continental shelf?
 - no provision expressly says this...
- Can the limits established by the coastal State which are *different from* the recommendations (*giving the coastal State larger outer CS than what was said by the recommendations*) still be “on the basis of the recommendations”?
- this is the question of treaty interpretation.
- **context** matters.
 - Annex II to UNCLOS is an integral part of UNCLOS according to Art 318 of UNCLOS
 - Annex II constitutes the *context* when interpreting the term “on the basis of” under Art 76(8) of UNCLOS, according to Art. 31(2) of VCLT

Art 7 of Annex II to UNCLOS, as context

- Art 7 provides:
- Coastal States *shall* establish the outer limits of the continental shelf *in conformity with* the provisions of article 76(8), and in accordance with the appropriate national procedures.
- So, the coastal State is obligated to
 - submit the information of outer CS to CLCS: indicated by **first sentence of Art 76(8)**
 - use and respect the recommendations of the CLCS: implied by **second sentence of Art 76(8)**
- **the third sentence of Art 76(8)** presupposes that the coastal State must *use* the recommendations of the CLCS *as the basis* for establishing the limits of its outer CS
- No other options? See Art 8 of Annex II to UNCLOS

Art 76(8) of UNCLOS

- Information on the limits of the continental shelf beyond 200 nautical miles ... shall be submitted by the coastal State to the CLCS ...
- The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf.
- The limits of the shelf established by a coastal State *on the basis of* these recommendations shall be final and binding.

Art 8 of Annex II to UNCLOS, as context

- Art. 8 provides:
- In the case of *disagreement by* the coastal State with the recommendations of the Commission, the coastal State *shall*, within a reasonable time, make a revised or new submission to the Commission.
- It means, when having disagreement, coastal State is left with only 3 choices
 - (1) to revise the submission, or make a new submission to the CLCS and wait for a new recommendation,
 - (2) to *establish* the limits of its outer CS consistent with such recommendations despite the disagreement, or
 - (3) to *forget about* establishing limits of outer CS
- Clearly, under UNCLOS the coastal State may not deviate from the recommendations of the CLCS when establishing the limits of its outer CS.
- Or, Art 8 of Annex II & Art 76(8) will be rendered meaningless.

Art 76(8) of UNCLOS

- Information on the limits of the continental shelf beyond 200 nautical miles ... shall be submitted by the coastal State to the CLCS ...
- The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf.
- The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.

Annex II to UNCLOS, as context

- Art. 7 provides: Coastal States shall establish the outer limits of the continental shelf *in conformity with* the provisions of article 76(8), and in accordance with the appropriate national procedures.
- Art. 8 provides: In the case of **disagreement** by the coastal State with the recommendations of the Commission, the coastal State **shall**, within a reasonable time, make a revised or new submission to the Commission.
- With the above in mind, the meaning of "on the basis of" under the third sentence of Art 76(8) may be interpreted as "in agreement with or consistent with", taking into account Arts 7-8 of Annex II to UNCLOS, as context of Art 76(8)
- Hence, the coastal State has an obligation to establish the limits of its outer CS in agreement with or consistent with the recommendations of the CLCS.
- this obligation is a presupposition of and implied by the 2nd & 3rd sentences of Art 76(8)

Art 76(8) of UNCLOS

- Information on the limits of the continental shelf beyond 200 nautical miles ... shall be submitted by the coastal State to the CLCS ...
- The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf.
- The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.

Situation Two

- (1) the recommendations of the Commission do not exist, *or*
- (2) the recommendations prepared by the subcommission do exist, but the Commission has not approved the recommendations
- however, the coastal State goes ahead by establishing the limits of its outer continental shelf
- **What's wrong with such an action by the coastal State?**
- it will violate the implied obligation under Art 76(8) as mentioned above.
- it will violate the “without prejudice” obligation for the coastal State to take no action...
- it will infringe the rights of common heritage of mankind pertaining to all other States in the world by encroaching upon the Area.

any justification for the coastal State to go ahead?

- the second sentence of Art. 76(8) says that
- “The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf.”
- in other words, the Commission is obligated to make recommendations for the coastal State.
- What happens if the Commission *just cannot approve* the recommendations prepared by the subcommission?
- Would the coastal State be justified to go ahead by establishing the limits of its outer continental shelf?
- perhaps, the coastal State may be criticized by going ahead when the Commission is justified for not making the recommendations

any justifications for the CLCS not to make recommendations?

- obligation of “without prejudice”?
- without prejudice to what?
- “the actions of the CLCS shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts”: Art. 9 of Annex II to UNCLOS
- “the recommendations approved by the Commission shall not prejudice the position of States which are parties to a land or maritime dispute”: Art. 5(b) of Annex I to the Rules of Procedure of the CLCS
- meanwhile, “the Commission recognizes that the competence with respect to *matters* regarding disputes which may arise in connection with the establishment of the outer limits of the CS rests with States”: Art.1 of Annex I to the Rules of Procedure of the CLCS
- therefore, it is the State Party to a land, maritime, or boundary delimitation disputes that has the competence to decide if certain actions of the CLCS will prejudice the position of that State in that particular dispute.
- this explains why the consent given by the States that are parties to such disputes can absolve the CLCS from its obligation not to consider and qualify a submission involving such disputes

justifications for the CLCS not to make recommendations and obligation for the coastal State to take no action

- “in case 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.” **Art. 5(a) of Annex I to the Rules of Procedure of the CLCS**
- it is also understandable why the coastal State must think twice before establishing the limits of its outer CS when the CLCS refuses to make recommendation due to lack of consent of all States Parties to land or maritime disputes.
- because the “without prejudice” obligation also exists for the coastal State to take no action...
- **Arts. 2(b), 4(b), 5(b), 6 of Annex I to the Rules of Procedure of the CLCS**

Land or Maritime dispute under Art. 5(a) of Annex I to the Rules of Procedure of the CLCS

- **what does it mean by a “land dispute”?**
 - **who has territorial sovereignty over a land or a maritime feature?**
- **what does it mean by a “maritime dispute”?**
 - **a maritime boundary delimitation dispute**
 - **a maritime entitlement dispute, not involving delimitation**
 - not involving maritime boundary delimitation or territorial sovereignty disputes, a dispute concerning the capability of a maritime feature to generate continental shelf, or, put differently, a dispute concerning the legal status of a maritime feature (rock or island?) under Art 121 of UNCLOS
 - the hint lies in the title of Annex I to the Rules of Procedure: **“Submissions in case of a dispute between States with opposite or adjacent coasts or *in other cases of unresolved land or maritime disputes*”**

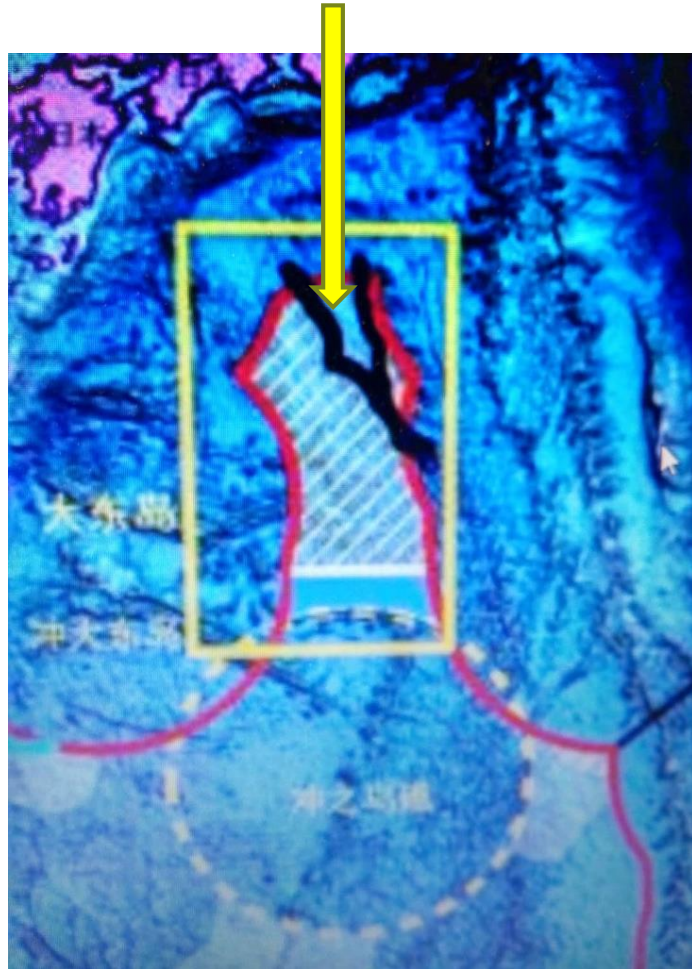
Application of the law to the facts

Unjustified outer CS of Japan not established on the basis of CLCS' recommendations

Situation One

CLCS recomm do exist, but Japan's decree fails to follow the recomm

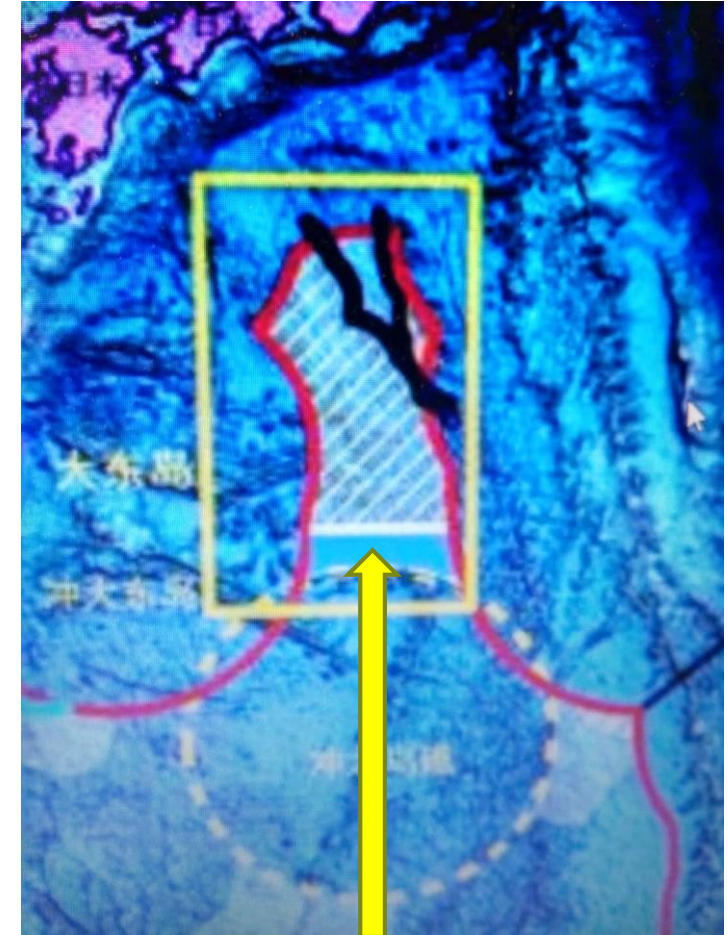
Japan's outer CS goes beyond what CLCS recomm said



Situation Two

CLCS recomm do not exist, but Japan went ahead by declaring its outer limits of CS beyond 200 nm

implicated by Okino-Tori Shima



what laws have been violated?

- **Art. 76(8) of UNCLOS: an implied obligation**
 - the coastal State *has an obligation to* establish the limits of its outer CS *in agreement with or consistent with* the recommendations of the CLCS.
- **Arts 7-8 of Annex II to UNCLOS, as an intergral part of UNCLOS**
 - Coastal States *shall* establish the outer limits of the continental shelf *in conformity with* the provisions of article 76(8), and in accordance with the appropriate national procedures.
 - In the case of *disagreement by* the coastal State with the recommendations of the Commission, the coastal State *shall*, within a reasonable time, *make a revised or new submission to the Commission.*
- **Art 137(1) of UNCLOS**
 - No State shall claim or exercise sovereignty or sovereign rights over any part of *the Area* or its resources, ...
- **Art. 300 of UNCLOS**
 - State Parties shall fulfil *in good faith* the obligations assumed under this Convention...

Can anyone do anything about it?

non-recognition obligations for all States

- **Art 137(1) of UNCLOS**

- No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. **No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized.**

- **Art 137(3) of UNCLOS**

- **No State or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area** except in accordance with this Part. **Otherwise, no such claim, acquisition or exercise of such rights shall be recognized.**

obligations for the ISA to act on behalf of mankind owning all rights in the resources of the Area

- **Art 137(2) of UNCLOS**

- **All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act.** These resources are not subject to alienation. The minerals recovered from the Area, however, may only be alienated in accordance with this Part and the rules, regulations and procedures of the Authority.

the role of Seabed Disputes Chamber

Jurisdiction of the Seabed Disputes Chamber

Art 187(a)-(b) of UNCLOS:

The Seabed Disputes Chamber shall have jurisdiction under this Part and the Annexes relating thereto in disputes with respect to activities in the Area falling within the following categories:

- (a) *disputes between States Parties* concerning the interpretation or application of this Part and the Annexes relating thereto;
- (b) *disputes between a State Party* and *the Authority* concerning:
 - (i) acts or *omissions of the Authority* or of a State Party alleged to be in violation of this Part or the Annexes relating thereto or of rules, regulations and procedures of the Authority adopted in accordance therewith; or ...

