Submission of Brazil and Article 76 of the Law of the Sea Convention (LOSC) 1982,

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ABSTRACT

Brazil on 17 May 2004 became the second State to make its submission to the Commission on the Limits of the Continental Shelf (CLCS) as required by Article 76 of the Law of the Sea Convention (LOSC). The Brazilian submission assumes particular significance as the first submission to the CLCS by a developing State member of the Group of 77. This article seeks to examine the Brazilian submission vis-à-vis the provisions of Article 76 of LOSC.

Introduction

Almost three years after the submission of the Russian Federation to the Commission on the Limits of the Continental Shelf (CLCS) under article 76 of the LOSC, Brazil made its submission on 17 May 2004. This article examines the Brazilian submission in light of Article 76 of LOSC.

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The CLCS is an institution established under Art. 76 (8) and Annex II of the LOSC 1982 to consider submissions by coastal States on their continental shelf beyond 200 nautical miles and it is composed by 21 members, experts in the field of geology, geophysics or hydrography, who though elected by States Parties on an equitable geographical representation basis serve in their personal capacities. See generally Ted L. McDorman, “The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World,” (2002) 17 (3) The International Journal of Marine and Coastal Law, pp. 301–324. The present members elected on 23 April 2002 for a term of five years commencing from 16 June 2002 are Al-Azri, Hilal Mohamed Sultan (Oman); Albuquerque, Alexandre Tagore Medeiros de (Brazil); Astiz, Osvaldo Pedro (Argentina); Awosika, Lawrence Folajimi (Nigeria); Betah, Samuel Sona (Cameroon); Brekke Harald (Norway); Carrera Hurtado, Galo (Mexico); Croker, Peter F (Ireland); Fagoonee, Indurlall (Mauritius); Francis, Noel Newton St. Claver (Jamaica); German, Mihai Silviu (Romania); Jaafar, Abu Bakar (Malaysia); Juracic, Mladen (Croatia); Kazmin, Yuri Borisovitch (Russian Federation); Lu, Wenzheng (China); Park, Yong-Ahn (Republic of Korea); Pimentel, Fernando Manuel Maia (Portugal);
of the Law of the Sea Convention (LOSC) 1982 a second State has made its submission.\(^2\) On 17 May 2004, Brazil, a developing State located in the South American continent having as its immediate neighbours on the coast, Uruguay and French Guiana, made its submission to the CLCS through the Secretary-General of the United Nations in line with article 76 paragraph 8 and rule 44 of the Rules of Procedure of the Commission.\(^3\) As one of the broad-margin States, the Brazilian representative at the 187th plenary meeting of the resumed eleventh session of UNCLOS III, not surprisingly, had indicated his government's approval of the continental shelf regime as enunciated in Article 76 of the Convention when he stated:

Emphasis should be given to the importance of the regime for the continental shelf as established by the new Convention, for that regime not only provides a multi-lateral juridical basis for the sovereign rights of the coastal State over energy and mineral resources of the sea-bed to a distance of 200 miles from the coastline but also expressly recognizes the extension of those rights beyond this limit up to the outer edge of the continental margin.\(^4\)

The Brazilian submission assumes particular significance as the first submission to the CLCS by a developing State member of the Group of 77 and it is likely to be a prelude to more submissions by States, including developing States, a number of which are expected to make submissions by 2009.\(^5\) This write up seeks to examine the Brazilian submission vis-à-vis the provisions of Article 76 of LOSC.

\(^{cont.}\)

Symonds, Philip Alexander (Australia); Tamaki, Kensaku (Japan); Thakur, Naresh Kumar (India) and Woeledji, Yao Ubuena (Togo). See <http://www.un.org/Depts/los/clcs_new/commision_members.htm> [All sites referred to in this article were visited on 27 January 2005 except where otherwise stated].


\(^3\) See 1833 UNTS 396 and CLCS/3/Rev.3 of 6 February 2001 respectively. The Rules of Procedure, has since 2 July 2004 being superseded and replaced by Rules of Procedure of the Commission on the Limits of the Continental Shelf, CLCS/40 of 2 July 2004, which in effect consolidated the previous Rules of Procedure, Modus Operandi of the Commission and the Internal Procedure of the Subcommission of the CLCS, along with amendments and additions up to 30 April 2004.

\(^4\) See UNCLOS III Official Records Vol. XVII, p. 40, para. 25. Also see the Brazilian Declaration upon signing the LOSC on 10 December 1982 where it declared inter alia that “Brazil exercises sovereignty rights over the continental shelf beyond the distance of two hundred nautical miles from the baseline, up to the outer edge of the continental margin, as defined in article 76.” <http://www.un.org/Depts/los/conv_agreements/convention_declarations.html#Brazil%20Upon%20signature>: It is not clear if there is any significance in the use of “sovereignty rights” rather than “sovereign rights,” as contained in Art. 77 (1) of LOSC but see Art 12 of Law No. 8.617 of 4 January 1993, on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf. <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/BRA.htm>.

I. Brazilian Legislation on the Outer Continental Shelf

The Brazilian outer continental shelf covers an area equal to 911,847 square kilometres and is believed to contain rich mineral deposits. Its domestic legislation, Law No. 8.617 of 1993, adopting article 76 paragraph 1 of LOSC, affirms the extended continental shelf by declaring that the Brazilian continental shelf:

comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental shelf does not extend up to that distance.

The legislation acknowledges the need to make submission to the CLCS in respect of the extended continental shelf by declaring that the outer limits of the Brazilian continental shelf will be established in accordance with the article 76 provision. Although the Brazilian legislation's definition recognises the possibility of both inner and outer continental shelf, it does not specifically make a distinction between the regimes applicable to the outer shelf, as distinct from that of the inner shelf. For instance, the legislation merely states that the State has sovereign rights for the purpose of exploring and exploiting natural resources in the continental shelf. This provision, though in line with the LOSC, does not anywhere acknowledge the LOSC stipulation requiring a State with an outer continental shelf, in the eventuality of commercial exploitation of this part of the continental shelf, to make payments or contributions in respect of such exploitation at a specified rate after the first five years of production to the International Seabed Authority (ISA) for distribution to States Parties. The LOSC exempts a developing State from payment or contributions if it can establish to the ISA that it is a net importer of the

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6 The phrase “outer continental shelf” is used in this article to describe the continental shelf beyond 200 nautical miles.
8 Article 11 of Law No. 8.617 of 4 January 1993, on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf.
9 Art. 11 Sole Paragraph of Law No. 8.617.
10 Art. 12 of Law No. 8.617.
11 Art. 77 of LOSC.
12 Art. 82 (1) and (2) of LOSC. Payments and contributions, not including the resources used in connection with exploitation, are at the rate of 1% of the value or volume of production at the 6th year and these increases by 1% of each subsequent year until the 12th year when it stabilises and remains at 7% thereafter.
particular mineral resource produced in its outer continental shelf. Brazil, as a developing State, would have to satisfy the precondition of being a net importer of the mineral resources produced in its outer continental shelf to enjoy this exemption.

II. Time Limit

Brazil became party to the LOSC as far back as 22 December 1988 and is expected to make its submission with respect to its outer continental shelf within ten years of the entry into force of Convention. With the decision of the Meeting of States Parties (SPLOS) to the effect that the ten-year period shall be taken to have commenced on 13 May 1999 for States which the Convention came into force before that date, the Brazilian submission falls well within the time limit. More broad-margin States Parties falling within the ten-year limit between the years 2004 and 2009 are expected, in due course, to follow the example of Brazil and make their submissions to the CLCS. It is not clear, however, what the legal effect of non-submission within the time frame is, although there is certainly the need for broad-margin States Parties to comply with their international obligation and make such submission so that the part of the seabed which falls within the Area and is the common heritage of mankind can be clearly demarcated.

Oude Elferink discussing the ten-year limit refers to Article 300 of the LOSC and describes it as an obligation that the States Parties have to fulfil in good faith, though he concludes that non-compliance would not seem to have consequences on the entitlement of a broad-margin State to its extended continental shelf. He arrived at this conclusion upon an examination of Article 76, which confirms that the entitlement

13 Art. 82 (3) of LOSC.
17 See Art. 1 (1) of LOSC defines the Area as “the sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction.”
to a continental shelf is based on distance from the coast or in the case of broad-margin States, on natural prolongation, and does not depend on occupation or express proclamation. Also, he points out that the CLCS, though having the function to consider the data and other materials as well as make recommendations, does not have any competence to determine a coastal State’s title to the continental shelf. 19 Although the ten-year limit provision appears not to have any legal bite in the form of sanction imposed upon non-complying States, it does bear out to the need for the relevant institutions, including the CLCS and the United Nations division for ocean affairs, to embark on extensive education, counselling and support programmes directed towards broad-margin States, especially developing States, to encourage them to submit within the ten-year limit. 20 Fortunately there is a trust fund to assist in training technical and administrative personnel, as well as the providing of technical and scientific advice, to help developing States prepare their submissions. 21 The submission of Brazil, well within the ten-year limit despite the lack of sanctions, confirms its good faith compliance with article 76. It also has the advantage of providing for Brazil a certainty in the eyes of the international community of its extended continental shelf when such limits are established based on the recommendations of the CLCS and published by the United Nations Secretary-General. Hopefully with the submission by Brazil other members of the Group of 77 with extended continental shelf, including African States, 22 would take advantage of the experience and expertise of Brazil in this regard to comply with their obligation under Article 76. 23 There is already such indication as Namibia, an African State member of the Group of 77, is utilising the assistance of Brazilian consultants to prepare its submissions to the CLCS. 24

19 Ibid. at p. 498. See Art. 76 (1) and (8); Art. 3 (1) (a) of Annex II and also Art. 77 (3) of LOSC.
20 See General Assembly Resolution 58/240 of 5 March 2004, para.17 which encourages States parties that are in a position to do so to make their submissions within the ten year period. <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N03/508/92/PDF/N0350892.pdf?OpenElement>
21 See General Assembly Resolution 55/7 of 27 February 2001, para.18, which mandates the United Nations Secretary General to establish this trust fund. As at 31 December 2003 the Fund had a balance of $1,137,053. <http://daceessdds.un.org/doc/UNDOC/GEN/NOO/559/81/PDF/NOO55981.pdf?OpenElement> From this fund candidates from six developing States have been sent on a training course designed by the CLCS. Also seven developing States have requested assistance from the fund to send their nationals to a similar training course offered by the Southampton Oceanography Centre, United Kingdom. See paras. 105 to 107 and 129 of the Report of the Secretary-General of the United Nations on Oceans and the law of the sea to the Fifty-ninth session of the General Assembly, A/59/62 of 4 March 2004. See note 16 above.
23 See General Assembly Resolution 55/7, para.5 that urges the international community to assist developing States in, amongst other things, the preparation of information under article 76 and annex II. See note 21 above.
There is no suggestion that the ten-year limit under article 4 of annex II, which applies to the original submission, applies to a revised or new submission that is made after the CLCS's recommendation. Neither does it appear to extend to submissions made by a coastal State in respect of certain parts of its continental shelf after a previous partial submission within the time limit. However such State would be expected to make such submission in good faith within a reasonable time.25

III. Dispute with other States

Brazil indicated in its submission that it is not engaged in any territorial dispute concerning its outer continental shelf with any other State.26 The combined effect of Article 76 (10) of the LOSC and the extensive provisions of the Rules of Procedure of the CLCS on this issue make it clear that the Commission would not consider any submission in respect of an area that is subject to dispute, except with the prior consent of all the parties to the dispute.27 For instance, in its recommendations with regard to the submission made by the Russian Federation, the CLCS recommended in respect of the Sea of Okhotsk that the Russian Federation make a well-documented partial submission to exclude certain disputed parts, with a further recommendation that it should make its best efforts to arrive at an agreement with Japan, which had challenged part of the submission.28 In addition, in the disputed areas of the Barents and Bering Seas the CLCS required the Russian Federation, upon entry into force of the maritime boundary delimitation Agreements with Norway in the Barents Sea (no such agreement has been concluded between Norway and the Russian Federation) and the United States of America in the Bering Sea, should transmit to it the charts and co-ordinates of the delimitation lines representing its extended shelf in those areas.29 Also in respect of the Arctic Ocean, where

cont.

Also in 2002 Brazil organised a training course on delineation of the outer limits of the continental shelf beyond 200 nautical miles that was attended by thirty participants, whose expenses were borne by the Government of Brazil, from 24 developing States in Africa, Asia and Latin America and the Caribbean. Para. 25 of the Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission, CLCS/32 of 12 April 2002.

25 See for example Art. 8 of Annex II of LOSC.
29 Para. 39 of the Report of the United Nations Secretary-General, Ibid. The Russian Submission
Canada, Denmark and Norway had indicated some concerns in respect of the Russian Federation's claims, the CLCS recommended that the Russian Federation make a revised submission based on certain findings contained in the recommendations.  

Brazil has a convex coastline facing the Atlantic Ocean, with no opposite States until the African continent. Therefore it has advantage of not having the possibility of maritime territorial dispute with opposite coastal States. Also in respect of the adjacent States of Uruguay and French Guiana, with whom the Brazilian government has entered delimitation Agreements, there is no such dispute. However these delimitation Agreements seem to only delimit maritime boundary up to 200 nautical miles and therefore there would appear to be no agreement in respect of delimitation beyond 200 nautical miles. It is interesting that Brazil makes no reference to this fact in the executive summary accompanying its submission.

Whilst the LOSC and the Rules of Procedure appear to be focused on disputes between the submitting State and States claiming title to the areas that are the subject-matter of the submission, it is not clear whether a "dispute" would be regarded as having arisen if a State, whether coastal or landlocked, with no direct claim to title of the disputed area (hereinafter called "third party State"), challenges the submission on the grounds that, contrary to the LOSC, it encroaches on the seabed and the resources declared to be the common heritage of mankind. The interest of this State being, as a potential beneficiary of the financial and other economic benefits derived from the Area, that the action of the submitting State, contrary to the Article 76 provisions, amounts to an encroachment upon the Area and has the potential of diminishing its utilised the boundary as delimited in the maritime boundary Agreement it signed with the United States on 1 June 1990 though this Agreement was yet to be approved by the Russian Duma. See notes 52 and 54 below on the communications of the United States and Norway. See A.G, Oude Elferink, "The Law and Politics of the Maritime Boundary Delimitation of the Russian Federation: Part 2," (1997) 12 (1) International Journal of Marine and Coastal Law, p. 5. The exact nature of the findings is not disclosed in the Report of the United Nations Secretary-General. See Para. 41 of the Report of the United Nations Secretary-General, A/57/57/Add.1 of 8 October 2002 (note 28 above). See communications of Canada, Denmark and Norway (notes 49, 50 and 54 below). Also in respect of Canada see Ted L. Mcdorman, "Canada Ratifies the 1982 United Nations Convention on the Law of the Sea: At Last," (2004) 35 (2) Ocean Development and International Law, p. 103 at 107. Prescott, "Resources of the Continental Margin and International Law," in Cook and Carleton (eds.), op. cit. p. 64 at 67. (note 7 above)


34 Art. 140 of LOSC.
potential benefits from activities in the Area. Such disputes, which raises the issue of what part of the seabed falls within national jurisdiction and what part falls outside national jurisdiction, could arguably raise an interpretative issue under the LOSC that would make the third party dispute settlement mechanism under the Convention available to such State Party. Also, would there be a dispute, which would cause the CLCS to decline to make recommendations if the International Seabed Authority (ISA), as the custodian of the Area, challenges a submission as being an encroachment on the Area? It has been suggested that the responsibility of the coastal State to establish the outer limit of the continental shelf, along with the rather limited role of the ISA to merely organise and control activities in the Area, implies that the ISA cannot be a party to proceedings concerning a dispute in respect of the outer limits of the continental shelf. Mahmoudi, points out that the argument in support of the exclusive competence of the States to determine the outer limits of its continental shelf could only be justifiable before the era of community claim on the seabed (the Area) and the creation of the ISA as a subject of international law with the responsibility over the Area that shares common boundaries with coastal States. He appears to lean in favour of some sort of role for the ISA in the process of the determination of the outer limit of the continental shelf, but ruefully observed that neither the international community nor its trustee, the ISA, is given any such role. However, it is arguable that the role of the ISA as some kind of “trustee” over the Area, which shares common frontiers with the outer limits of the continental shelf, implicitly gives it a competence to ensure that there is no encroachment into the common heritage Area in violation of Part XI. Further, it is suggested that the ISA should be able to take a coastal State before the Sea-Bed Disputes Chamber, which has exclusive jurisdiction over disputes between a State Party and the ISA in respect of “acts or omissions of the Authority or of a State Party alleged to be in violation of this Part [Part XI] or the Annexes relating thereto or of rules, regulations and procedures of the Authority adopted in accordance therewith.” In such situation, it is urged that the CLCS should refrain from making recommendations in respect of such “disputed” areas.

35 See Art. 1 (1) and Art. 134 (3) and (4) of LOSC.
37 Art. 157 (1) of LOSC.
40 Art. 187 (b) (i) of LOSC. It is argued that by virtue of the combined effect of Art. 1 (1), 134 (3) and 137 (1) of the LOSC the issue of the outer limit of the continental shelf of a coastal State, in so far as it amounts to an encroachment on the Area would amount to a violation of Part XI of LOSC.
Recently, in relation to the Brazilian submission the issue of the status of a challenge to the submission by a third party State has somewhat arisen. The United States of America, a third party State, in a communication to the CLCS through the Legal Counsel of the United Nations raised certain concerns in relation to the sediment thickness and the Vitoria-Trindade feature of the submission.\(^4\) The CLCS however declined to take consideration of the communication of the United States of America. It based this on the ground that, under Annex II of the LOSC and its Rules of Procedure, communications from States other than the submitting one will only be considered by the Commission if it relates to disputes between States with opposite or adjacent coasts or in other cases of unresolved land or maritime disputes.\(^4\) In the opinion of this writer, the interpretation given by the CLCS to Annex II and its Rules of Procedure is rather narrow and unhelpful, in view of its role directed towards achieving certainty in the outer limits of the extended continental shelf. This writer sees no reason why such challenges of third party States or even the ISA, capable of coming before the dispute settlement mechanism of the LOSC, would not amount to a dispute that would require the CLCS to refrain, until such dispute is resolved or clarified. Although strictly speaking third party States and the ISA do not have a basis under a claim to title to the extended continental shelf, unlike a challenge by States in respect of land or maritime disputes as well as those with opposite or adjacent coasts; they do have some kind of interest in the Area, the common heritage of mankind, akin to the interest of beneficiaries and trustees under certain domestic law, to take action to protect trust property.\(^4\) Therefore the CLCS should not shut its eyes to possible communications from such third party States and the ISA, but rather should consider such communications on their merits in order to determine whether or not they are germane.

**IV. The Brazilian Submission and Article 76 Provision**

In line with the Modus Operandi of the Commission the Brazilian government's submission consists of three parts made up of an executive summary,


\(^4\) See Paras. 16 and 17 of the Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission, CLCS/42 of 14 September 2004. It is not clear if the fact that the United States of America is a non-State party to the LOSC had any bearing to the decision of the CLCS, although this is doubtful since the United States of America had earlier in respect of the earlier Russian submission forwarded its communication. Also both Canada and Denmark were not parties to the LOSC at the time of their communications to the CLCS in respect of the earlier Russian submission parties.

a main body and all supporting scientific and technical data. Presently only the executive summary has been publicised, since there is no obligation on the submitting State or the CLCS under Article 76 and Annex II of LOSC to publicise the main body and all supporting scientific and technical data, even to States likely to be affected one way or the other by the determination of the outer limit of the extended continental shelf. This shroud of secrecy in the submission under Article 76 has been, rightly in this writer’s view, criticised by Ron Macnab to the effect that the rather brief nature of the divulged information may not provide enough information to support any meaningful assessment by other States. This is all the more so, since not only directly affected States, but also the International Seabed Authority (ISA) should be given the opportunity to make detailed presentations on such submissions which may have the effect of encroaching into the Area, which is the common heritage of mankind. The inability of affected States and entities to make adequate response as a result of the lack of comprehensive data is reflected in the responses of Canada, Denmark, Japan and the United

44 Section I paragraph 3 of Modus Operandi, CLCS/L.3 of 12 September 1997 [Now contained in Annex III, Para. 1 of the Rules of Procedure, CLCS/40 of 2 July 2004 where the submitting state is required to submit 22 copies of the Executive Summary, 8 copies of the main body and 2 copies of the supporting scientific and technical data, if submission is made in hard copy. Submission in electronic form should be in a secure unalterable format and certified to contain a true and complete copy of the hard copy. In cases of discrepancies between the electronic and hard copy of the submission the latter would be deemed to be the primary source].


46 See the confidentiality provisions of Annex II of the Rules of Procedure.


48 Under Arts. 1 (1) and 136 of LOSC. See arguments of the writer in respect of communications by third party States and the CLCS in section above titled “Dispute with other States.”

49 In its response the Canadian government stated that “Canada is not in a position to determine whether it agrees with the Russian Federation’s Arctic continental shelf submission without provision of further supporting data to analyse and that Canada’s inability to comment at this point should not be interpreted as either agreement or acquiescence by Canada to the Russian Federation’s submission”. See the Permanent Mission of Canada to the United Nations Note Verbale No. 0145 of 18 January 2002, United Nations CLCS.01.2001.LOS/CAN of 26 February 2002. <http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/clcs_01_2001_LOS_CANtext.pdf>


51 Japan in its rather detailed response begins on a cautious note by pointing as follows,
States of America\textsuperscript{52} to the Secretary-General of the United Nations communication and the executive summary published in respect of the submission made by the Russian Federation.\textsuperscript{53} Of all the five States, which responded to the submission of the Russian Federation, only Norway did not make any reference to a lack of adequate scientific data.\textsuperscript{54} It is doubtful, if the shroud of secrecy surrounding the data of the submitting State is helpful in achieving the kind of certainty obviously intended by the provisions of the LOSC, which declares that the outer limits of the continental shelf established by the coastal State on the basis of the CLCS'S recommendation to be \textit{"final and binding."}\textsuperscript{55} For the Commission to be able to make an informed and proper recommendation it is expected that it should have the opportunity of a full and comprehensive response by affected States and other entities, especially the ISA, based on their access to the necessary scientific data. It is appreciated that in the interest of national security and other paramount national interest it may be necessary to exclude access to certain scientific data. However this should be an exception and not the rule.\textsuperscript{56} It is difficult to understand, in an era when the world is leaning towards more transparency and access to information, why


\textsuperscript{52} In the conclusion to its response the United States of America points out that \textit{"The integrity of the Convention and the process for establishing the outer limit of the continental shelf beyond 200 nautical miles ultimately depends on adherence to legal criteria and whether the geologic criteria and interpretations applied are accepted as valid by the weight of informed scientific opinion. A broad scientific consensus of the relevant experts, not confined to the Commission, is critical to the credibility of the Commission and the Convention."} See Permanent Mission of United States of America to the United Nations, Note Verbale of 28 February 2002, United Nations CLCS.01.2001.LOS/USA of 18 March 2002. \textit{<http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/clcs_01_2001_LOS_USAText.pdf>}

\textsuperscript{53} Section II (2) (a) (v) of Annex III of the Rules of Procedure, CLCS/40 requires the submitting states' representative to make comments on any note verbale from other States regarding the data and other materials in the executive summary which in itself would only be useful if the other States had been given the opportunity of adequate access to the data and materials to properly frame their objections to the submission.


\textsuperscript{55} Art. 76 (8) of LOSC. See discuss below on the section \textquotedblleft Recommendation of CLCS\textquotedblright{} in respect of the possible effect of the phrase \textit{"final and binding."}.

\textsuperscript{56} Annex II, Para. 2 of Rules of Procedure CLCS/40 seems to imply that unless the data and other material is specifically classified as confidential by the submitting state it would not enjoy that status, by stating: "The coastal State making a submission may classify as confidential any data and other material, not otherwise publicly available, that it submits in accordance with rule 45."
such scientific data, in the interest of the integrity of the whole process, cannot be made accessible, at the very least to States that are directly affected by such submission and the ISA, as custodian of the Area. This may be made subject to the proviso that such submitting State can make a cogent case in exceptional circumstances for certain particular data to be confidential on identifiable grounds of national security and paramount national interest.

Article 76 provides rather complicated methods to calculate the outer limits of this extended continental shelf. One method, the Irish formula, requires delineation using straight lines not exceeding 60 nautical miles connecting fixed points as defined by co-ordinates of latitude and longitude, by reference "to the outmost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such a point to the foot of the continental slope." The other method, the Hedberg formula, requires the same type of straight lines to be delineated by reference "to fixed points not more than 60 nautical miles from the foot of the continental slope." The outer limit of the extended continental shelf is not to exceed 350 nautical miles from the baselines or 100 nautical miles from the 2500 metre isobath.

The executive summary of Brazil is accompanied by two charts, one depicting the outer limit of the continental shelf and the other the lines and limits; a map showing the fixed points at a distance no greater than 60M from each other, and a table showing the geographic co-ordinates of the fixed points defining the outer limit. The map with the fixed points divides the outer limit of the Brazilian continental shelf into five segments identified on the map as points OL1, OL2, OL3, OL4, OL5 and OL6. These points indicate the areas of the outer limit beyond 200 nautical miles (See points OL1-OL2; OL3-OL4 and OL5-OL6). It also indicates the areas of the outer limit coinciding with the 200 nautical miles distance from the baselines (See points OL2-OL3 and OL4-OL5). The responsibility of the CLCS is restricted to the limits of the continental shelf beyond 200 nautical miles and does not extend to the limits coinciding with 200 nautical miles. In respect of the latter the obligation upon Brazil is to deposit with the Secretary-General of the United Nations...
charts and relevant information, including geodetic data, who is to give such materials due publicity.\textsuperscript{64} Such charts and other information deposited with the Secretary-General are to "permanently" describe the outer limits of the shelf. For the outer continental shelf such charts and other information can only be deposited with the Secretary-General after the limits of the shelf has been established on the basis of the recommendations of the CLCS.

The executive summary shows that both the Hedberg and Irish formula is utilised in determining the outer limit of the extended continental shelf of Brazil. The Scientific and Technical Guidelines of the Commission permits this\textsuperscript{65} and as was pointed out by Macnab:

It is not mandatory to apply uniquely the distance formula or the sediment thickness formula throughout the study area, and in any particular location, a coastal state may apply the formula that is most advantageous to its interests. The results of the two formula derivations can be composited to maximise the area enclosed: for convenience and to acknowledge the technique of its derivation, the term formula line is sometimes used to describe this composite construction.\textsuperscript{66}

Further the executive summary reveals that the Brazilian outer continental shelf limit beyond 200 nautical miles is based on the 350 nautical miles from the baselines.\textsuperscript{67} In order to determine the outer limit of the continental up to 350 nautical miles it is necessary to locate the baselines of the coastal State from which the breadth of the territorial sea is measured.\textsuperscript{68} The Brazilian domestic legislation determines that the baseline should be measured from the low-water line marked on officially recognised large-scale charts and in appropriate places from straight baselines.\textsuperscript{69} It has since, as required by Article 16 (2) of LOSC, made deposits of the list of geographical co-ordinates defining the points of the straight baselines with the United Nations Secretary-General.\textsuperscript{70} The significance of the baselines in determining the outer continental shelf raises the issue of the role of the CLCS in cases where other States contest the baselines' claimed by the submitting State as being contrary to LOSC.\textsuperscript{71} In such a case will the CLCS be in a position to inquire into the baselines? It is doubtful that the CLCS would be able to consider such, as its role under Article 76 is limited to considering the outer limits of the extended continental

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\textsuperscript{64} Art. 76 (9) of LOSC.
\textsuperscript{65} See Paragraph 2.1.5 of the CLCS Scientific and Technical Guidelines.
\textsuperscript{66} Macnab, op. cit. p. 7 (note 47 above).
\textsuperscript{67} See Art. 76 (5) of LOSC. Also see Chris Carleton et al., "The Practical Realisation of the Continental Shelf Limit" in Cook & Carleton (eds.), op. cit. p. 268 at 278–281. (note 7 above)
\textsuperscript{68} Art. 76 (1) of LOSC.
\textsuperscript{69} See Art. 1 of Law No. 8.617 of 4 January 1993.
\textsuperscript{70} <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/depositpublicity.htm>
\textsuperscript{71} See for example the Statement by India dated 22 May 2001 contesting Pakistan's claims to straight baselines. DOALOS, \textit{Law of the Sea Bulletin} No. 46 (New York, United Nations, 2001), p. 90.
Figure 1. Location and Extent of the New Zealand Mandatory Area to be Avoided as agreed at NAV 49.
It would however appear that such a challenge, if valid, would indicate that the submitting State could, by making excessive claims to straight baselines, significantly extend its outer limits beyond 350 nautical miles and thereby encroach into the Area, the common heritage of mankind. In the view of this writer there is a strong case for the CLCS to refrain from considering such submission until such challenge has been resolved by the appropriate dispute settlement mechanism.

V. Advice by CLCS

Although the executive summary complies substantially with the Modus Operandi of the Commission it fails to specifically disclose whether or not any member of the Commission, including the member who is its national, rendered any advice in the preparation of the submission and if so the names of such members. Under Annex II of LOSC the CLCS, as one of its functions, is allowed to provide through its members scientific and technical advice to a coastal State preparing for submission, if it so requests. This advice to a particular state can only be provided by a maximum of three CLCS members, which would presumably include the member who is a national of the submitting State, if he renders advice, since such member is appointed to serve in his personal capacity and not as the representative of his State. The request for advice is to be forwarded to the CLCS, which has a standing committee to deal with such requests. The requirement of stating the names of such members in the executive summary, is probably an attempt to introduce some element of openness and transparency since such members, along with the national of the submitting State, are excluded from participating in the subcommission dealing with the submission, though they may participate in the

72 See the communication of the United States of America to the Russian submission. (note 52 above) where it said: "The Government of the United States of America is of the view that, while the Commission has no competence over questions of baselines from which the breadth of the territorial sea is measured, it should not be perceived as endorsing particular baselines. In any event, the Commission should ensure that it does not, on a global basis, endorse baselines, whether or not they may be inconsistent with international law. It might, for example, indicate in all recommendations regarding all submissions, that it is not taking a position regarding baselines."

73 See Section I paragraph 3 (c) of the Modus Operandi. [Now Section 2 (a) (iii) of CLCS/40]. At the presentation of the Brazilian submission at the 14th Session of the CLCS the Brazilian representative disclosed that the Commission member from Brazil actually assisted in preparing the submission. See Para. 11 of CLCS/42 of September 2004.

74 See Art. 3 (1) (b) of Annex II of LOSC and also Rule 55 (1) of the Rules of Procedure, CLCS/40.

75 Rule 55 (3) of the Rules of Procedure, CLCS/40.

76 Art. 2 (1) of Annex II of LOSC.

77 The Standing Committee on provision of scientific and technical advice to coastal States currently constituted by the following members of the Commission: Lawrence Folajimi Awosika (Rapporteur); Noel Newton St Claver Francis; Mihai Silviu German; Philip Alexander Symonds (Chairman) and Konsaku Tamaki (Vice-Chairman). See <http://www.un.org/Depts/los/clcs_new/commission_members.htm>.
plenary session of the CLCS in respect of such submission. So far there has been no formal request for advice by any coastal State. Brazil, the eighth largest economy in the world, though a developing State appears to have the requisite expertise and therefore made no request for advise from the CLCS. The non-inclusion of the names of the members of the CLCS by Brazil in the Executive summary is therefore explicable on the ground that no such advice was formally sought from the CLCS, although it has been disclosed that advice was actually provided by the member of the Commission from Brazil. Perhaps it would have been better for the Brazilian Executive summary to have categorically made a statement to the effect that advice was sought only from the member who is a national of Brazil. It is not clear, however, why less developed and relatively poorer States, reported to be in the process of preparing their submissions, have not taken advantage of this avenue of seeking and obtaining expert scientific advice. There is some advantage, in the opinion of this writer, in obtaining pertinent scientific and technical advice from a member of the CLCS, familiar with the workings of the Commission and having the benefit of being actually involved in the consideration of previous submissions. The advice would not only be of great assistance to these States, which lack the expertise to deal with the complex requirements of delineation, but also be of great help in avoiding certain scientific and technical hitches faced by previous submitting States.

The legal effect of a failure to disclose the names of advising members is not clear though Article 4 of Annex II appears to make such disclosure mandatory. However the better view is that, in the event of such non-disclosure, the defect should be treated as merely procedural to be remedied either by discerning such names from the report such adviser members are required to submit to the CLCS, or through the requirement of disclosure of the names of such adviser members by submitting State during their presentation at the first meeting of the CLCS to consider the submission.

The member of the Commission from Brazil is excluded from being a member of the sub-commission considering the Brazilian submission. It is not

78 Art. 5 of Annex II of LOSC and Rule 45 (b) of Rules of Procedure, CLCS/40. In considering the Russian submission the CLCS decided that, apart from members that assisted the submitting State by providing technical and scientific advice and the member who is a national of the submitting State, members who are nationals of a State with opposite or adjacent coasts or a State that might have a dispute with the submitting State as regards the submission, should not be selected as a member of the Sub-commission. See Paras 14 and 15 of the Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission, CLCS/32 of 12 April 2002.
79 See para. 25 of Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission, CLCS/39 of 30 April 2004.
80 Para. 11 of CLCS/42 of September 2004. (see note 73 above).
81 See note 16 above for the list of potential submissions.
82 Rule 55 (5), CLCS/40.
83 Section II (2) (a) (iii) of Annex III, CLCS/40.
84 <http://www.un.org/Depts/los/clcs_new/commission_members.htm#Members> See Art. 5 of Annex II of LOSC.
clear as to the legal effect if an excluded member of the CLCS participates as a member of the sub-commission considering the submission. Would it nullify the sub-commission’s proceedings and decision or would it merely be a procedural effect? In the view of this writer, as a result of not only the mandatory nature of the provisions of Article 4, but also the element of fairness and natural justice implied in their non-participation, such participation would nullify the entire proceedings and findings of the sub-commission. Upon such nullification the CLCS should be required to inaugurate another sub-commission, excluding such interested member(s), to consider the submission afresh.

VI. Procedure upon Submission

Upon submission to the CLCS, through the United Nations Secretary-General, the consideration of such submission is included in the agenda of the next meeting of the CLCS. If, however, the next meeting does not fall within the three months period from the date of the publication of the executive summary it would be included in a subsequent meeting. The Brazilian submission, which was made after the thirteenth session of the CLCS that took place in New York from the 26–30 April 2004, was put on the provisional agenda for the fourteenth session that took place in New York from 30 August to 3 September 2004. The submitting State is to be notified, not later that sixty days before the meeting, of the date and place of the meeting with an invitation to it to send its representatives, who shall have no vote, to the proceedings that the Commission deems the attendance of such representatives to be relevant. The agenda of the meeting is to include; the presentation of the submissions by the submitting State’s representatives and the nomination and selection of a seven-member sub-commission, subject to the exclusion of certain interested members, to consider the submissions.

85 See Paras 14 and 15 of CLCS/32 of 12 April 2002 where the Chairman of the Commission alluded to need to avoid “potential conflict of interest” and the need to “ensure the highest possible integrity of the proceedings” as the reasons to exclude from the Sub-commission members that have advised and the national of the submitting State, as well as those who are nationals of a State with opposite or adjacent coasts or of a State which might have a dispute with the submitting State.

86 Rule 51 (1), CLCS/40.


88 Rule 52 of CLCS/40. The Brazilian representatives consisting of Vice-Admiral Lucio Franco de Sa Fernandes, the Director of Hydrography and Navigation, Ministry of Defence of Brazil and a delegation of experts, were invited to the meeting where they made a formal presentation of the submission. See para. 11 of CLCS/42 of September 2004.

89 Rule 51 and Annex III, Section II (2) of CLCS/40. The Chairman of the CLCS in respect of the Brazilian submission proposed a procedure whereby the nomination of the members of the Subcommission would be conducted in two phases. The first phase required each of the members of the CLCS from the same regional grouping to nominate one member, a
In considering the submission the sub-commission is to consider the specific elements of the submission by ensuring that the format is in compliance with the Technical Guidelines and the executive summary complies with the Modus Operandi. It also has to conduct a technical evaluation of the submission by confirming which of the Article 76 criteria was utilised; an analysis of the data to verify whether the co-ordinates were established from primary sources or other sources, the validity of all the co-ordinates, that all the segments in the delineation are not longer than 60 nautical miles and generally whether the data submitted in terms of quality and quantity justifies the outer limit claimed. Further, it is to ascertain whether there are matters to be clarified by the submitting State and to examine the position of States with opposite or adjacent coasts and whether there is any dispute with another State as regards the submission. If the format of the submission is not correct the sub-commission may require the submitting State to correct it or provide additional information. Where certain information needs clarification it is entitled to call on the representatives of the State to clarify such matters. In considering the submission the sub-commission is entitled to consult with relevant specialists and competent international organisation. In the case of disputes with other States the sub-commission is to take cognisance of Article 76 (10) and Article 9 of Annex II of LOSC by declining to examine such disputed areas, except with the prior consent of all the States that are parties to the dispute. The meeting of the sub-commission to consider the Brazilian submission was held for two weeks during the fourteenth session, however as a result of the volume and complexity of the data submitted it was constrained to inform the CLCS that it would meet once again during the fifteenth session.

Once the sub-commission has examined the submission and is satisfied that all is in order it is required to make recommendations in writing to the Commission. These recommendations are to be approved by a majority of two thirds of the members present and voting at a plenary meeting requiring a quorum of two-thirds of the members, with the members, including those who advised and the

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process that was co-ordinated by the Chairman. Subsequently, as a second phase, the nominees from all the regional groupings were announced to the CLCS and deemed to be appointed to the Subcommission by acclamation. The essence of this procedure was to achieve both geographical and scientific balance in appointing the Subcommission. Through this procedure the following members were selected as members of the Subcommission to consider the Brazilian submission: Astiz (Argentina); Awosika (Nigeria); Carrera (Mexico); Juracic (Croatia); Symonds (Australia); Lu (China) and Park (Korea). See paras. 19 and 21 of CLCS/42 of September 2004.

90 Annex III, Section III of CLCS/40.
91 Annex I and Annex III, Section III (7) of CLCS/40.
92 Annex III, Section III (3) and Section IV (10) of CLCS/40.
93 Annex III, Section III (6) of CLCS/40.
94 Rules 56 and 57 and Annex III, Section IV (10) (1') of CLCS/40.
95 See Annex I of CLCS/40.
96 Para. 25 of CLCS/42 of September 2004.
national of the submitting State, being entitled to one vote. If the plenary body decides to make amendments to the recommendations of the sub-commission, the recommendations would be adjusted to reflect such amendments and thereafter approved. Upon approval by the Commission the recommendations is submitted in writing to the submitting State and to the Secretary-General of the United Nations.

VII. Recommendation of CLCS

Upon receipt of the recommendations of the CLCS, Brazil has the option to either agree or disagree with the recommendations. If it disagrees with the CLCS's recommendations it is required to make a revised or new submission within a reasonable time. It has been suggested that in such situation a “ping-pong” procedure is created whereby when the CLCS rejects unacceptable submissions, the coastal State has to make a revised or a new submission that has to be forwarded to the CLCS until there is a convergence. As a result of the CLCS' policy of engagement and its non-adversarial approach to submissions it is anticipated that a bulk of such disagreements between the CLCS and the submitting State would be resolved and result in a convergence. However it cannot be precluded that there would be certain cases, perhaps a minority, where convergence through the “ping-pong” procedure between the CLCS and the submitting State may be long-drawn and difficult. In such cases a third party settlement procedure would be most useful in the settlement of such disagreement. Presently, there is no third party settlement procedure specifically incorporated into the LOSC to reconcile any such disagreements between the CLCS and the submitting State. Although, some may balk at the use of

97 Art. 6 (1) and (2) of Annex II of LOSC; Section IX of CLCS/40.
98 See Art. 53 (1) and (2) as well as Annex III, Section VII (Summary Flow Chart) of CLCS/40. In the case of the Russian submission the plenary body made several amendments to the recommendations of the Sub-commission and thereafter adopted the recommendations by consensus. See Para. 37 of the Report of the United Nations Secretary-General, (Addendum), Oceans and the law of the sea, to the 57th Session of the General Assembly, A/57/57/Add.1 of 8 October 2002.
99 Art. 6 (3) of Annex II of LOSC and Rule 53 of CLCS/40.
100 Art. 8 of Annex II of LOSC and Rule 53 (4) of CLCS/40.
103 See however various suggestions on possible procedures in Part XV of LOSC in Egede, op. cit. at p. 161. (note 5 above)
judicial or arbitral system to resolve such disagreements because of the non-adversarial nature of the whole procedure of submissions and the extremely technical and scientific nature of the issues involved, there is an advantage in having a third party involvement in resolving protracted disagreements. Even if the view is taken that an adversarial system is not ideal in this situation, such third party settlement system could take the form of some kind of conciliation procedure. Although Part XV of the LOSC makes provision for settling disputes by way of conciliation, the way and manner in which this whole part is couched appears to suggest that the dispute settlement procedures, except in certain limited exceptional cases, is only applicable to disputes between States Parties to the Convention. The conciliation procedure, though non-binding on the parties, gives room for a third party (or parties) to dispassionately consider the areas of disagreement with a view to reconcile the areas of disagreement between the CLCS and the submitting State. Such third party non-adversarial dispute resolution procedure would be useful as a standby mechanism in the eventuality of a protracted disagreement between the CLCS and the submitting State that defies speedy reconciliation through the “ping-pong” procedure. Does this require an amendment of the LOSC? Ordinarily, this would be the most ideal situation; however the cumbersome nature of the amendment process would not encourage an adoption of this course of action. It is arguable that there is precedence on the adjustment of the provisions of the LOSC in respect of submissions on the extended continental shelf, without embarking on formal amendment procedures. This precedence is in the form of the adjustment of the commencement dates for submission by the SPLOS without following the formal amendment procedures of LOSC. It is suggested that the SPLOS could make provision for a list of independent conciliators versed in the provisions of the LOSC on submissions in respect of extended continental shelves, who would be invited in cases where the “ping-pong” procedure is unable to accomplish expeditious settlement of disagreements between the CLCS and submitting State. Presently, there appears to be nothing in the LOSC to preclude the CLCS from agreeing to such conciliation ad hoc in cases of protracted disagreements.

On the other hand if Brazil accepts the CLCS’ recommendation the LOSC provides that “The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.” The implication of this provision has attracted comments from a number of jurists, especially

105 Arts. 312 and 313 of LOSC.
107 Art. 76 (8) of LOSC.
108 See Oude Elferink, The Continental Shelf beyond 200 nautical miles: The Relationship between the CLCS and Third Party Dispute Settlement, op. cit. pp. 119–122 (note 27 above); McDorman, The Role of the Commission on the Limits of the Continental Shelf: A
as regards the effect of the phrase, "final and binding." The critical question is—whom is it final and binding upon? Is it final and binding only on the submitting State or does it create an obligation erga omnes? To take the view that it is only final and binding on the submitting State would, in the view of this writer, detract from the whole idea of achieving certainty concerning the outer limits of the extended Continental Shelf, within a reasonable period, which is implied by the LOSC provision that submissions should be made within a certain period. There is no reason why such outer limits should not be final and binding erga omnes after the recommendation of the CLCS since States who could possibly have any objection should have raised their objections promptly upon receipt of the executive summary, which the United Nations Secretary-General is required to distribute to all States Parties and publicise. If any such State believes any aspect of the submission is contrary to the LOSC it could avail itself of the Part XV dispute settlement mechanism against the submitting State. Also for States with opposite or adjacent coasts or involved in land or maritime disputes with the submitting State, such challenge made prior to the recommendation, should create a dispute that would preclude the CLCS from considering the submission in the relation to the disputed area until such dispute is resolved or all the disputing parties consent to such consideration.

To limit the final and binding nature of the outer limits established in accordance with the recommendation of the CLCS to only the submitting State would effectively detract from the certainty in demarcating the Area, the common heritage of mankind, which the requirement of submission within a fixed time limit seeks to achieve. The only time such challenge should be countenanced after the recommendation should be limited to two exceptional cases. First, where the limits established by the submitting State is not in line with the recommendations of the CLCS, in which case it falls outside Article 76 (8), and second, where the CLCS in making its recommendations has clearly detracted from the laid down criteria in the Article 76 provisions.

Barring these two exceptions, there is no reason why the limits, established in line with the CLCS’ recommendations, should not be final and binding erga omnes. Obviously, to deduce whether the exceptions apply there would be a

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100 See Annex I of CLCS/40.

111 Oude Elferink, “The Continental Shelf beyond 200 nautical miles: The Relationship between the CLCS and Third Party Dispute Settlement,” op. cit. p. 115. (See note 27 above)
need for more transparency in respect of the recommendations. Under the LOSC the obligation of the CLCS is limited to submitting the details of the recommendation to the submitting State and the Secretary-General of the United Nations, without any obligation on the part of the latter to publicise the recommendations.\textsuperscript{112} This in itself limits the ability of States Parties to determine whether the outer limits established by the submitting State is actually in line with the CLCS’ recommendations, and also whether the CLCS in making its recommendations complied with the Article 76 provision.\textsuperscript{113} There is therefore a need to give the CLCS’ recommendations adequate publicity. A step in this direction has been made by the recent amendment to the CLCS’ Rules of Procedure that requires the sub-commission considering the submission, upon preparation of the recommendations to be submitted to the plenary body, to also include a summary of such recommendations, with a requirement that the United Nations Secretary-General publicises the summary upon its approval by the plenary body.\textsuperscript{114}

In the event that Brazil has no disagreements with such recommendation it would be expected to establish the outer limits of its extended shelf in line with the recommendations and thereafter deposit with the Secretary-General of the United Nations charts and relevant information, including geodetic data, permanently describing the outer limits of its continental shelf. Thereafter the Secretary-General is under an obligation to give it due publicity.\textsuperscript{115}

Conclusion

The submission of Brazil to the CLCS in respect of its extended continental shelf under Article 76 is a significant development. After a period of inactivity, the submissions of the Russian Federation and Brazil, as well as the even more recent Australian submission, now require the CLCS to grapple with the practical application of the provisions of Article 76. The experience gained by the CLCS in dealing with the Russian submission would no doubt come in very useful in its consideration of the Brazilian submission. Certainly, the experience further gained by the CLCS in respect of the Brazilian submission should also equip it to deal with subsequent submissions, including that of Australia and others expected to be made in the near future. It is hoped that the lessons learnt by the CLCS as it deals with these submissions would enable it make the necessary adjustments to ensure that the whole process from submission to the recommendations is transparent and effective in order

\textsuperscript{112} See Art. 6 (3) of Annex II, LOSC.
\textsuperscript{114} See Annex III, Section V (11) (3) of CLCS/40.
\textsuperscript{115} Art. 76 (9) of LOSC.
to achieve certainty in the outer limits of the continental shelf of broad-margin States. With the recent submission of Australia it would be interesting to see how the CLCS would cope with considering two submissions simultaneously. Hopefully, this should prepare the Commission to handle the number of submissions expected from a number of States between 2005 and 2009.\(^\text{116}\)

\(^{116}\) See note 16 above for list of submissions expected between 2005 and 2009.