

International Law Association Committee on the Legal Issues of the Outer Continental Shelf (ILA-CLIOCS)

Draft Report on Article 82 of the 1982 UN Convention on Law of the Sea (UNCLOS)^δ for the 2008 ILA Conference, Rio de Janeiro, Brazil.

1.0 Introduction and Background

1.1 The term ‘outer continental shelf’ (OCS) used in this draft report denotes only the area of sea-bed and subsoil appertaining to a coastal State extending beyond the 200 nautical mile (M) limit (drawn from the territorial sea baselines of the coastal State) to the outer limits established by the coastal State according to the procedure laid down by Article 76 and Annex II of the 1982 UN Convention on the Law of the Sea (UNCLOS).¹ The 1982 UNCLOS regulates activities in the sea bed beyond the 200 nautical mile (200M) limit, up to the alternative limits established by Articles 76(5). Within this legal regime, coastal States have sovereign rights and certain other jurisdictional powers over the sea bed and subsoil of the outer continental shelf (OCS) area beyond 200M.²

^δ Prepared by David M. Ong, Co-Rapporteur to the International Law Association (ILA)'s Committee on the Legal Issues of the Outer Continental Shelf (ILA-CLIOCS). Reader, University of Essex Law School, Wivenhoe Park, Colchester, Essex CO4 3SQ, UK. E-mail: daveo@essex.ac.uk.

¹ The 1982 United Nations Convention on the Law of the Sea (UNCLOS) entered into force on 16 November, 1994, exactly one year following the deposit of the instrument of ratification of the sixtieth (60th) State Party – Guyana, in accordance with Article 308 of the Convention. There are currently 150? States Parties to this Convention. Accessible at:

http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#

(Accessed on ?? June, 2008.)

² For States Parties to the 1982 UNCLOS, the outermost extent of the continental shelf beyond the 200M limit must fulfil certain geological and geomorphological criteria specified in

1.2 It is widely accepted that Article 82 of the 1982 UNCLOS represents a compromise between the divergent interests and thus legal positions of two groups of States at the Third United Nations Conference on the Law of the Sea (UNCLOS III). The so-called 'broad margin' States insisted on claiming sovereign rights and jurisdiction over their continental shelves beyond 200M; whereas an opposing group of States, comprised mainly but not exclusively, of land-locked and geographically disadvantaged States, argued for a final limit for coastal State continental shelves to be set at 200M. As the authoritative Virginia Law School's Commentary on the 1982 UNCLOS notes, '...in return for the extension of the CS beyond the 200-mile limit, the broad shelf States would share the revenue derived from the exploitation of the (non-living) resources of the extended continental shelf with the international community through payments or contributions in kind.'³ The esteemed authors of the Virginia Commentary are in no doubt that this undertaking by the 'broad margin' States represented the second part of the compromise reached between themselves and the other States keen on establishing as large an Area (of deep sea bed) as possible, with Article 76 being the first part of the compromise, providing the method for establishing the outer limits of the continental shelf beyond 200M. Brown too notes that '(A)rticle 82 reflects

Article 76 of the Convention. The legal issues arising from the criteria and procedure for the delineation of the OCS limits are the subject of the first Co-Rapporteur's Reports to the International Law Association (ILA)'s Committee on Legal Issues of the Outer Continental Shelf (ILA-CLIOCS). See Report of the International Committee on Legal Issues of the Outer Continental Shelf Issues to the Biennial International Law Association (ILA) Conference in Berlin, Germany on ?? August 2004, in *Report of the Seventy-First (71st) Conference*, London: ILA (2004) 773-819. Accessible at: <http://www.ila.org/>... (Hereinafter, First Report) See Second Report of the International Committee on Legal issues of the Outer Continental Shelf to the Biennial International Law Association (ILA) Conference in Toronto, Canada on June 2006, in *Report of the Seventy-Second (72) Conference*, London: ILA (2006) 215-253. See also: Preliminary Report of the International Committee on Outer Continental Shelf Issues to the Biennial ILA Conference in New Delhi, India on 5 April, 2002. International Law Association, *Report of the Seventieth (70th) Conference*, New Delhi, 2-6 April, 2002 (London: ILA) 741-753.

³ At p.932, para.82.1, Vol.II, ed. by Satya N. Nandan and Shabtai Rosenne (1993)

an attempt to modify the consequences of the (Third Law of the Sea) Conference's policy of recognising that the coastal State's continental shelf rights extended to those parts of the continental margin which lay beyond the 200-mile line.⁴ This certainly seems to reflect the common position adopted by the African States that participated in the negotiations to the Convention on this issue. Egede, for example, notes that when the African States conceded the right of 'broad margin' continental shelf States to claim continental shelves beyond 200M, this concession was based on the understanding that such States would make contributions or payments from mineral resource production in the continental shelf area beyond 200M, as a kind of *quid pro quo*.⁵ Article 82 thus provides for the application, albeit in limited form, of the Common Heritage of Mankind (CHM) principle within the OCS, even though the OCS is within the coastal State's maritime jurisdiction. As Oda points out, this provision was 'instituted in such a manner that the concept of the common heritage of mankind plays a role in controlling over-expansion of the exclusive interests of coastal States in their continental shelves.'⁶

1.3 Examining the pattern of proposed drafts of Article 82 for effectuating this obligation in the UNCLOS III negotiations towards the 1982 UNCLOS, several points can be noted. First, the obligation to make some form of payments or contributions in kind for the exploitation of the natural resources of continental shelf was accepted by the developed States within the 'broad margin' group of States, including the USA, but was gradually limited in its application only to the continental shelf beyond 200M (OCS). Second, the role of the International Sea-bed Authority (ISA) in collecting and disbursing these revenues was also gradually reduced during the course of UNCLOS III negotiations. Third, the exemption from making such payments or contributions for developing States, now

⁴ E.D. Brown, *The International Law of the Sea, Volume 1: Introductory Manual*, Aldershot: Dartmouth (1994) at 262.

⁵ Egede (2004) *op. cit.*, at 158, citing official Statements by African States participating in the Conference and recorded in UNCLOS III, *Official Records*, Vol.II, at 160-165.

⁶ Oda (1989) *op. cit.*, at xxxii.

provided in Article 82(3), was introduced only later in the negotiation process. In fact, it first appears in the Informal Composite Negotiating Text (ICNT) and was raised as an issue only in the fifth negotiating session in 1976. Fourth, at no time during the UNCLOS III negotiating process was there any discussion of proposals for specific dispute settlement procedures to be established in respect of disagreements between States as to the interpretation of various phrases within this Article, beyond those provided more generally in Part XV of the Convention.

1.4 This draft report will examine Article 82 of the 1982 UNCLOS providing for the obligation to make ‘payments or contributions in kind’ for ‘the exploitation of non-living resources’ within the continental shelf beyond 200 nautical miles (200M), and related Articles governing the role of the International Seabed Authority (ISA) in the implementation of Article 82. In particular, the following aspects of the OCS legal regime will be analysed: 1) Article 82 providing for the obligation to make payments or contributions in kind’ for non-living resource exploitation beyond the 200M limit; and 2) other relevant Articles within the 1982 Convention, as amended/ modified by the 1994 Implementation Agreement,⁷ providing for the role of the International Sea-bed Authority (ISA) in respect of the implementation of the obligation articulated in Article 82.

1.5 The structure of this draft report on Article 82 of the 1982 UNCLOS is as follows: First, definitional and interpretation issues arising from the terms and phrases used within Article 82 will be discussed. Second, questions on the role to be played by the International Sea-bed Authority (ISA) in the application of Article 82 will be examined.

⁷ Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.

2.0 Definition and Interpretation Issues of Article 82 of the 1982 UNCLOS

2.1 Article 82 of the 1982 UNCLOS provides as follows:

‘Payments and contributions with respect to the exploitation of the continental shelf beyond 200 nautical miles

1. The coastal State shall make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

2. The payments and contributions shall be made annually with respect to all production at a site after the first five years of production at that site. For the sixth year, the rate of payment or contribution shall be one percent of the value or volume of production at the site. The rate shall increase by one percent for each subsequent year until the twelfth year and shall remain at seven per cent thereafter. Production does not include resources used in connection with exploitation.

3. A developing State which is a net importer of a mineral resource produced from its continental shelf is exempt from making such payments or contributions in respect of that mineral resource.

4. The payments or contributions shall be made through the Authority, which shall distribute them to State Parties to this Convention, on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least-developed and the land-locked among them.’

2.2 Several words and phrases within these paragraphs, will now be subjected to more specific analysis. The main issues arising are those concerning the definition and interpretation of these specific words and phrases, as well as the application of these provisions. However, it is also

important to understand the logical flow of both the obligation laid down by Article 82, and the way in which this obligation is to be implemented under Article 82 and other relevant Articles of the 1982 Convention. This is as follows:

2.3 First, it should be noted that Article 82(1) provides the basic obligation of payments or contributions in kind, but without elaborating on either the *amount* of the payments, or *value* of the contributions in kind to be made, or *how* these payments or contributions will be made. Article 82(2) then provides a formula for determining the *amounts* of ‘payments or contributions’ to be made. Article 82(4) further provides that the payments will be made ‘through’ the (International Sea-bed) Authority on the basis of ‘equitable sharing criteria’ for distribution to other States Parties to the Convention (i.e., *how*). The ‘equitable sharing criteria’ used to guide the distribution of the ‘payments or contributions’ must ‘take into account’, and therefore arguably prioritize States Parties that are developing countries, especially the least developed and land-locked among them (i.e., *whom*). Finally, Article 82(3) provides an exemption to the general requirement to make such payments or contributions under Article 82(1). However, this is an exemption that is only applicable upon the fulfilment of two criteria: First, that the State is a ‘developing State’ and second, that this ‘developing State’ is a ‘net importer’ of the mineral resource produced from its continental shelf. Neither of these two terms – ‘developing State’, or ‘net importer’, is defined in the 1982 Convention.

2.4 The approach taken by the Committee to the interpretation and application of the significant terms and phrases within these provisions follows the general and supplementary rules of treaty interpretation set out, respectively, in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (VCLT). As the general rule of treaty interpretation provided in Article 31 of the 1969 VCLT makes reference to the principle of ‘good faith’, it is significant to note that Article 300 of the 1982 UNCLOS also provides that: ‘States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner that would not constitute an abuse of right.’ This in

turn echoes Article 26 of the 1969 VCLT entitled: 'pacta sunt servanda', which requires that: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'

2.5 The Committee was of the view that this principle of good faith, coupled with its attendant principle of the 'non-abuse of rights', is a vital aid to the interpretation and application of Article 82 of the 1982 UNCLOS. While the application of these general principles of international law and treaty interpretation may not yield definitive statements on the meaning of certain terms and phrases within Article 82, they have assisted the Committee in its elaboration of the range of possible interpretations and applications of these provisions.

2.6 Furthermore, as certain terms and phrases within Article 82 have accepted meanings within the petroleum industry, the Committee was also of the view that its elaboration of the range of possible interpretations and applications of the relevant terms and phrases should reflect their usage within this industry, where appropriate. However, caution has also been expressed as to whether the utilization of such terms and phrases common to the petroleum industry should necessarily have the same implications for the exploitation of 'mineral' or 'non-living' resources that are not part of the petroleum industry.

2.7 Focussing on Article 82(1), it is the 'coastal State' that is under a duty to make the required 'payments or contributions in kind' from the exploitation of the 'non-living resources' in the OCS. Thus, the general obligation is imposed on the coastal State, rather than any other entity, such as the actual producers of the 'non-living resources' concerned. This international obligation placed upon the coastal State need not necessarily be passed on to the corporate entities that are in fact, exploiting the 'non-living resources', even if this is what will normally occur in practice. In other words, the coastal State concerned can choose to make the 'payments or contributions in kind' required from within its own revenue streams (principally royalty and tax) arising from the exploitation of the non-living resources in the OCS and thus,

absorb or otherwise deflect, the cost of making these 'payments or contributions in kind' from companies operating within its OCS.

Conclusion 1: The general obligation to make 'payments or contributions in kind' rests with the 'coastal State'. This State has the discretion to absorb this requirement and make these payments or contributions from its own revenue streams, or require them to be made by the corporate entities that are in fact exploiting the 'non-living resources' of the OCS.

2.8 A further difficulty arising from the statement of obligation articulated in Article 82(1) relates to the phrase 'contributions in kind'. Within this context, this phrase is clearly meant as an alternative to payments in cash or a related type of currency. However, as Lodge points out, there is no definition of what 'contributions in kind' entail, and perhaps more importantly, the types of contributions that cannot be included within the meaning of this phrase.⁸ The coastal State therefore also has discretion over the nature or type of the 'contribution in kind' that is required, subject to the presumption that any such 'contribution in kind' must be equivalent in 'value or volume of production' (Article 82(2)) to any payment that would otherwise have to be made by the coastal State. This requirement of the coastal State to make either a 'payment' or 'contribution in kind' that is equivalent in 'value or volume of production' (required under Article 82(2)) is also subject to the principle of good faith within international law generally, and specifically within both the 1969 VCLT and the 1982 UNCLOS, as noted above in para.2.4.

2.9 A related question in this respect is as to whether the coastal State is allowed to make a combined payment and contribution in kind amounting to the equivalent 'value or volume of production'. Again, it would seem that the coastal State has the discretion to propose this mode of fulfilling its general obligation under Article 82(1), subject to the practical (as opposed to legal)

⁸ Michael Lodge, '...', *International Journal of Marine & Coastal Law (IJMCL)* Vol.? No.? (2006) pp.?

requirement to negotiate with the International Sea-bed Authority (ISA) as the initial recipient of these 'payments or contributions'.

2.10 In this context, the precise role of the International Sea-bed Authority (ISA) as the officially designated conduit for such 'payments or contributions in kind' is critical, and will be considered further below (in Section 3). However, Article 82(4) does not specify whether the Authority, as the initial recipient of these payments or contributions, can decide whether the obligation is to be fulfilled by *either* payments *or* contributions in kind, or indeed, any combination of payments and contributions amounting to the equivalent 'value or volume of production.' A further issue that arises is as to the timing of the payments or contributions in kind. As Chircop and Marchand have noted, 'Article 82 is silent on *when* such payments or contributions shall be made other than that it be annual. The timing of payments and contributions may have an effect on the ultimate value given the commodity price fluctuations.'⁹ Here, the Committee was generally of the view that the ISA can rely on its role as the explicitly designated international institution for the receipt and transfer of the payments and/or contributions in this regard, to enable it to negotiate with the coastal State concerned on all practical aspects for the receipt of such payments and/or contributions. Both the principles of good faith and non-abuse of rights provided in Article 300 of the 1982 UNCLOS arguably enjoin the coastal State to negotiate with the ISA on both the method or mode and timing of the payments or contributions in kind.

2.11 What about the role of the recipient States in this matter? In other words, can a land-locked, developing State decide that it wants 'contributions in kind' - for example, in the form of crude oil shipments, rather than cash payments

⁹ Aldo Chircop and Bruce A. Marchand, 'International Royalty and Continental Shelf Limits: Emerging Issues for the Canadian Offshore', unpublished paper presented at the Canadian Petroleum Foundation, Second East Coast Seminar, 18-20 September 2003, Terra Nova Park Lodge and Golf Resort, St. Johns, Newfoundland and Labrador, 21pp. and Annex, at p.19. Copy on file with author. See also Chircop, 'Operationalizing Article 82 of the UNCLOS: A New Role for the International Sea-bed Authority, *Oceans Yearbook*, Vol. 18 (2004) 395-412.

as proposed by the coastal State. Here, unlike in the case of the ISA above, there is no explicit provision for any role to be played by the recipient States, beyond the possibility of contributing to the elaboration of the 'equitable sharing criteria' by the ISA as the basis for its distribution of the payments or contributions to these States. As Pulvenis notes when summarising the outcome of the negotiations on this issue at UNCLOS III: 'Having regard to the specific nature of the coastal State's rights over the continental shelf..., the Conference decided not to grant other States or the international community as represented by the International Sea-Bed Authority a right to direct participation in the exploration of shelf's resources; as a compromise it chose to establish an obligation on the coastal State to share out the revenue it derived at least from exploiting the mineral resources beyond 200 miles.'¹⁰

2.12 Thus, the Committee was of the view that recipient States can have little influence on either the method or timing of the payments or contributions in kind to be made by the coastal State 'through' the ISA. Specifically, this means that the putative recipient States do not have a formal role in determining either the form, method or timing of any payments or contributions in kind made by the coastal State.

*Conclusion 2: As it is the coastal State that has to make the required 'payments or contributions in kind', it follows that it is only this State and no other State(s) or inter-governmental or commercial entities (such as the ISA, or the companies involved in the actual production of the non-living resources concerned) that has the discretion to decide on the **form** in which the payments and/or contributions will take; the **method** by which such payments and/or contributions are delivered to the ISA; and exactly **when** such payments and/or contributions will be made to the ISA on an annual basis. Neither the ISA, 'through' which this payment and/or contribution is made, nor any of the recipient 'State Parties' of these payments and/or contributions, can*

¹⁰ Jean-François Pulvenis, 'The Continental Shelf Definition and Rules Applicable to Resources', in René-Jean Dupuy and Daniel Vignes (eds.), *A Handbook on the Law of the*

overturn the discretion afforded to the coastal State in this respect, although as the designated recipient of the payments and/or contributions made, the ISA can express its view on the latter two issues: the mode and timing of the payments and/or contributions, in negotiations with the coastal State concerned.

2.13 Another phrase that needs clarification in Article 82(1) is that of ‘non-living resources’. Specifically, what types of resources are to be encompassed by the phrase: ‘non-living resources’? In particular, this phrase: ‘non-living resources’, can be contrasted with that of ‘mineral resource’ utilized in Article 82(3), allowing developing States that are net importers of a ‘mineral resource’ to be exempted from making the payments or contributions required under Article 82(1). In this respect, it is important to recall that Article 77 of the 1982 UNCLOS echoes Article 2 of the 1958 Continental Shelf Convention (CSC) *verbatim* in providing all coastal States with sovereign rights over the ‘natural resources’ of the continental shelf. Indeed, every provision in these two Articles is exactly the same, including the definition of ‘natural resources’ provided in Article 77(4) of the 1982 Convention, and Article 2(4) of the 1958 CSC, respectively. ‘Natural resources’ as defined in these Articles ‘consist of the mineral and other non-living resources of the sea-bed and subsoil,...

2.14 Thus, it is possible to confirm that the phrase ‘non-living resources’ as utilized in Art. 82(1) embraces a wider definition of resources than merely that of ‘mineral’ resources. According to this definition, ‘non-living’ resources’ is the more generic of the two terms, so that while all ‘mineral’ resources are clearly also ‘non-living’ resources; conversely, not all ‘non-living’ resources are necessarily ‘mineral’ resources in their nature, composition, or utilization. All such ‘non-living’ resource exploitation by the coastal State, even if not ‘mineral’ in nature, is therefore subject to the obligation to make ‘payments or contributions in kind’ under Article 82(1), according to the tariff and schedule established in Article 82(2). One view expressed within the Committee is to

Sea, Vol.1, Hague Academy of International Law, Dordrecht: Martinus Nijhoff (1991) 315-381, at 377.

the effect that the more generic and over-arching term of 'non-living' resources was utilized to include liquefied hydrocarbon resources, which might not otherwise have been considered to fall within the notion of solid 'mineral' resources.

2.15 A further, possibly significant, legal implication of the different terms used in this context arises from the application of the exemption granted to developing States that are net importers of a 'mineral' (*but not* 'non-living') resource under Article 82(3). It cannot be precluded that the negotiating States to the 1982 Convention intended to distinguish between 'non-living' resources on the one hand, and 'mineral' resources on the other hand, with their specific use of the term 'mineral' in this context. Thus, if a developing State is exploiting a 'non-living' resource, but one that is *not* 'mineral' in nature, then the developing State concerned may not be exempt from the requirement to make payments or contributions under Article 82(1), even if this State is a net importer of the 'non-living', but not 'mineral', resource concerned. However, the Committee was generally of the view that such a distinction could not be sustained in light of the clear object and purpose of this exemption, which is to shield developing States from having to make payments or contributions in situations where these States are net importers of the 'mineral' or 'non-living' resource concerned.

Conclusion 3: Notwithstanding the possible legal implications of the inconsistent use of 'non-living' and 'mineral' resources between Articles 82(1) and 82(3), developing States that are net importers of the resources concerned are exempt from making the required payments and contributions in kind under Articles 82(1) and 82(2).

2.16 As for the actual 'value or volume of production' from which the payment or contribution in kind is to be calculated under Article 82(2), it should be noted that the first phrase of this provision states that such payments or contributions shall be made annually with respect to 'all' production at a site. The reference to 'all' production at a site seems to preclude the possibility of the coastal State concerned using the lower, net value of such production

after deducting its own royalties and/or taxes, in favour of the gross, well head value of such production.

2.17 A further question relates to the definition of the 'site' from which 'all' production is obtained. In the absence of an internationally well-accepted definition of 'a site', the coastal State has the discretion to designate the appropriate 'site' from which 'all' production is obtained.

Conclusion 4: The term 'all' production at a site refers to the gross, rather than net, value of the non-living resource obtained from that site, whereas the designation of a production 'site' is within the discretion of the coastal State concerned.

2.18 Another exception to the requirement to make payments or contributions relates to the last sentence in Article 82(2) which states as follows: 'Production does not include resources used in connection with exploitation.' The inclusion of the word: 'resources' here is problematic as this word is not defined in the 1982 Convention.¹¹ It can therefore be subject to different interpretations. For example, from the petroleum industry perspective, 'resources' can be taken to denote the initial amounts of less commercially valuable mixtures of oil, gas and/or water that are produced from a site, which are then pumped back into the petroleum reservoir to maintain or even increase the reservoir pressure in order to assist in the more efficient exploitation of the primary form of petroleum production from that reservoir.¹²

¹¹ Article 133 of the 1982 UNCLOS defines 'resources' as meaning 'all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the sea-bed, including polymetallic nodules', but this definition is expressly limited to 'the purposes of this Part', meaning Part XI governing the (deep sea-bed) Area.

¹² These are known as 'gas' or 'water injection' processes, according to the (Selected) Glossary of Oil and Gas Industry terms, accessible at:

<http://www.eandp.demon.nl/glossary>.

2.19 On the other hand, the word: ‘resources’ here can also be interpreted more widely as encompassing a whole gamut of *financial* resources, in terms of capital investments into the production site, and *human* resources, in the form of management and workforce labour time expended on site. This implies that the coastal State is entitled to deduct the costs of all the *financial* and *human* resources, in the form of capital investment and operating expenses incurred in the exploitation of the non-living resources from the designated production site, from the payment or contribution requirements under Articles 82(1) and 82(2). While the Committee was disinclined to accept such a wide interpretation for the term ‘resources’ within this context, the absence of a definitive meaning for this word within the 1982 Convention appears to leave coastal States with considerable discretion as to how it should be interpreted, subject to the principles of good faith and non-abuse of rights highlighted above as being applicable in these situations.

2.20 It should also be noted that even if the word: ‘resources’ is accepted as including financial and human resources, it is limited only to such ‘resources’ as are ‘used in connection with *exploitation*.’ (emphasis added) Thus any such financial and human ‘resources’ expended in the prospecting and exploration of a site; prior to, and as opposed to, its actual exploitation or production, cannot be excluded from the calculation of the gross ‘value or volume of production’ at any site.

Conclusion 5: The term: ‘resources’ in the last sentence of Article 82(3) is to be read as being limited to the introduction or re-introduction of physical elements such as water or gas that are utilized to directly assist in the exploitation of the non-living resources concerned.

3.0 The Role of the ISA in Implementing the Obligation under Article 82

3.1 Moving on from the definitional, interpretation, and application issues arising from Article 82 of the 1982 UNCLOS, the following discussion will examine the role of the International Sea-bed Authority (ISA) in the collection

and disbursement of the 'payments or contributions in kind' made by coastal States, as well as the recipient 'States Parties' to which these payments or contributions are to be distributed. Here too, several definition and interpretation issues need to be resolved in order to ensure the smooth implementation of Article 82.

3.2 Under Article 82(4), coastal States exploiting the non-living resources within the OCS shall make payments or contributions in kind through the International Sea-bed Authority (ISA) to other States Parties to the Convention, on the basis of 'equitable sharing criteria', taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them. This 'equitable sharing criteria' is to be developed by the Council, as the executive organ of the ISA, in the form of recommendations to the Assembly, under Article 162(2)(o)(i) of the Convention.

3.3 Under Article 162(2)(o)(i) of the 1982 UNCLOS, the Council is given the power to 'recommend to the Assembly rules, regulations and procedures on the equitable sharing of financial and other economic benefits derived from activities in the Area and the payments and contributions made pursuant to article 82, taking into particular consideration the interests and needs of the developing States and *peoples* who have not attained full independence or other self-governing status'. (emphasis added)

3.4 Then, under Article 160.2(f)(i) of the Convention, it is further provided that the powers and functions of the Assembly shall be, *inter alia*, 'to consider and approve, upon the recommendation of the Council, the rules, regulations and procedures on the equitable sharing of financial and other economic benefits derived from activities in the Area and the payments and contributions made pursuant to article 82, taking into particular consideration the interests and needs of developing States and *peoples* who have not attained full independence or other self-governing status. ..' (emphasis added)

3.5 The Council thus has to recommend, and the Assembly consider for acceptance, the 'equitable sharing criteria' to guide the disbursement of revenues (or other economic benefits) from two separate and possibly different streams: These are first, any financial and other economic benefits from deep sea-bed mining activities in the Area (beyond the limits of national jurisdiction); and second, any payments or contributions in kind from the coastal State under Article 82.

3.6 Here, two issues can be raised: The first issue relates to whether the 'equitable sharing criteria' to be recommended by the Council and accepted by the Assembly should be the same criteria in respect of each of these two separate streams of revenues (or other economic benefits). The second issue relates to the list of beneficiaries to which these two separate streams are directed.

3.7 On the first issue, it was noted by a Committee member that the criteria for determining how the financial and other economic benefits from activities in the Area would be distributed must also take into account the recommendations of the ISA's Finance Committee, according to Section 9(7)(f) of the Annex to the 1994 Implementation Agreement. On the other hand, the 'equitable sharing criteria' for the distribution of the payments or contributions in kind under Article 82(4) of the Convention must arguably prioritise 'the least developed and land-locked' among the developing States that receive these benefits. The inclusion of these additional factors within the development of the 'equitable sharing criteria' for these separate streams of financial or other economic benefits appears to argue for two separate sets of criteria to be developed and applied for each stream.

Conclusion 6: The procedure through which the 'equitable sharing criteria' is to be developed by the ISA for the distribution of the payments or contributions under Article 82 must be pursued separately from the criteria for disbursing the financial and other economic benefits from mining activities within the Area, because of the need to prioritise the 'least developed and

land-locked' developing States within this set of criteria (for Article 82 payments or contributions).

3.8 In relation to the second issue raised above (in para. 3.6), it will be recalled that under Article 82(4), the collected payments and contributions are to be distributed only to 'State Parties' to the Convention. Moreover, under Article 1(2)(2) of the 1982 UNCLOS, which refers to Article 305(1)(b)-(f) of the Convention, the term 'States Parties' includes, *inter alia*, under Article 305.1(e), not only States but also 'all *territories* which enjoy full internal self-government, recognized as such by the United Nations, but have not attained full independence in accordance with General Assembly resolution 1514(XV) and which have competence over the matters governed by this Convention...' (emphasis added)

3.9 The implications of the provisions above, when juxtaposed against the procedure for establishing the 'equitable sharing criteria' under Articles 160.2(f)(i) and 162.2(o)(i), respectively, seem to be that the potential list of beneficiaries appears to be wider than the entities listed in Article 305(1) as possible 'State Parties' of the Convention. Certainly, the use of the term 'peoples' rather than 'territories' within these two provisions – Articles 160(2)(f)(i) and 162(2)(o)(i), respectively, to describe entities that have not yet attained full independence considerably widens the scope of the potential list of beneficiaries. A discrepancy arises in that both the Council and Assembly of the ISA appear to be required to take into account the interests of 'peoples' who have not attained independence in the 'equitable sharing criteria' to be developed, even though such 'peoples' may not actually be capable of becoming 'States Parties' to the Convention, under Article 305(1) of the same Convention.

3.10 These differences in the wording of the relevant Articles can be reconciled by suggesting that the actions of the ISA's Council and Assembly are directed towards the preparation of a potential, rather than definitive, list of beneficiaries of developing States and other entities. Thus, these States and other entities will still have to become 'States Parties' to the 1982 Convention

before they can actually partake in the distribution of the payments or contributions in kind made by the coastal States through the ISA, under Article 82(4).

Conclusion 7: Regardless of whether the interests of 'peoples' or 'territories' that have not achieved full independence are taken into account in the development of the 'equitable sharing criteria' within the ISA, these entities will not be able to benefit from the payments or contributions in kind made by coastal States under Article 82, until they become 'States Parties' to the 1982 UNCLOS.

3.11 Finally, there is the possibility of a situation where a coastal State reneges on its obligation to make payments or contributions under Article 82, or a dispute arises between the State concerned and the International Seabed Authority (ISA) as to the amount that was paid or the nature of the payment that was made. In the event of such a situation arising, McDorman considers that 'the (Authority) would appear to be the body with the responsibility to pursue the matter since it is specifically mentioned in Article 82(4).'¹³ However, while it is true that the payments and contributions need to be made 'through the Authority' under Article 82(4), this body has not been assigned a formal 'debt collection' role in this respect, nor has it been given any special powers with which to compel a reneging coastal State to pay up. While the Council, as the executive organ of the Authority, has the power/duty to 'review the collection of all payments to be made by or to the Authority' (emphasis added) under Article 162(2)(p) of the Convention, it should be noted that this power/duty is limited to operations pursuant to Part XI, the scope of which applies only to activities in the Area.¹⁴ Since the Authority's role in this respect appears to be limited only to the collection and transmission of such payments or contributions according to the 'equitable

¹³ McDorman (1995) *op. cit.*, at 175.

¹⁴ Article 134(1) and 134(2) of Part XI of the Convention.

sharing criteria' to be developed by the organs of the ISA,¹⁵ it is arguable that the only entities that can make legitimate claims in the event of non-payment, or any dispute over the amount or nature of these payments or contributions, are the 'States Parties', particularly, 'the least developed and land-locked' developing States that are slated to be the main beneficiaries of these payments or contributions, under Article 82(4). Such a dispute between States Parties 'concerning the interpretation or application of this Convention' can be brought before the dispute settlement procedures within Part XV of the Convention.

3.12 On the other hand, it is possible for either the Assembly or the Council of the ISA to seek an advisory opinion from the Sea-Bed Disputes Chamber under Article 191 of the Convention on 'legal questions arising within the scope of *their activities*'. (emphasis added) As the ISA is the designated initial recipient of coastal States' payments or contributions, and both the Council and the Assembly are among the principal organs of the Authority under Article 158(1), this role is arguably within 'their activities'. Thus, either the Council or the Assembly can arguably refer any question of non-payment by a coastal State to the Chamber for an advisory opinion.

3.13 However, questions can be raised about the jurisdiction of the Sea-Bed Disputes Chamber to hear such a request for an advisory opinion as Article 187 of the Convention apparently limits the Chamber's jurisdiction to 'disputes with respect to activities in the Area'. Despite this limitation, it can still be argued by reference to Article 187(f) that the Chamber has jurisdiction in 'any other disputes for which the jurisdiction of the Chamber is specifically provided in this Convention.' Thus, Article 191 seems to provide the Chamber

¹⁵ Unlike the Authority's role in respect of activities in the (deep sea-bed) Area, which in the event of disputes arising between States Parties, or between States Parties and the Authority or other international institutions for the Area established by the Convention, allows for recourse to the Sea-Bed Disputes Chamber under Article 187, or by either a Special Chamber of the International Tribunal for the Law of the Sea, or an Ad Hoc Chamber of the Sea-Bed Disputes Chamber or to binding commercial arbitration, under Article 188 of Part XV.

with jurisdiction to hear requests from the ISA's Council or Assembly for advisory opinions on 'their activities.'

Conclusion 8: In the event of disputes arising from the interpretation and application of Article 82, the scope for the ISA to engage the coastal State within the dispute settlement procedures of the 1982 UNCLOS is limited to seeking an advisory opinion from the Sea-Bed Disputes Chamber, under Article 191 of the Convention. States Parties on the other hand, can utilize the dispute settlement procedures under Part XV against the coastal State concerned to 'settle any dispute between them concerning the interpretation or application of this Convention'.