

# INTERNATIONAL LAW ASSOCIATION

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### OUTER CONTINENTAL SHELF

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### Report on Article 82 of the 1982 UN Convention on Law of the Sea (UNCLOS)<sup>δ</sup>

#### 1.0 Introduction and Background

1.1 The term 'outer continental shelf' (OCS) used in this draft report denotes the area of sea-bed and subsoil appertaining to a coastal State extending beyond the 200 nautical mile (M) limit (drawn from the baselines from which the territorial sea is measured) to the outer limits established by the coastal State, according to the criteria and procedure laid down by Article 76 and Annex II of the 1982 UN Convention on the Law of the Sea (UNCLOS).<sup>1</sup> For States Parties to the 1982 UNCLOS, the outer limits of the continental shelf beyond the 200M limit are provided in Article 76 of the Convention.<sup>2</sup>

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<sup>1</sup> The 1982 United Nations Convention on the Law of the Sea (UNCLOS) was adopted on 10 December, 1982 and entered into force on 16 November, 1994. There are currently 156 States Parties to this Convention. Accessible at: [http://www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm#](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#), last updated 16 July 2008. (Accessed: 10 August, 2008).

<sup>2</sup> The legal issues arising from the criteria and procedure for the delineation of the OCS limits are the subject of the Reports prepared by Co-Rapporteur Dr. Alex Oude Elferink 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, August 2004, in *Report of the Seventy-First (71<sup>st</sup>) 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, 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 (70<sup>th</sup>) Conference*, New Delhi, 2-6 April, 2002 (London: ILA) 741-753.

- 1.2** This draft report will examine 1) 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 2) other relevant Articles in the 1982 Convention, and the 1994 Implementation Agreement,<sup>3</sup> providing for the role of the International Sea-bed Authority (ISA) in respect of the implementation of the obligation articulated in Article 82 for States Parties to the Convention. This report reflects the outcome of the Committee’s deliberations on the interpretation and implementation of Article 82, rather than on whether Article 82 reflects customary international law.
- 1.3** It is widely accepted that Article 82 of the 1982 UNCLOS represents a compromise between the divergent interests and thus equally disparate 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 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.’<sup>4</sup> The authoritative Virginia Law School’s *Commentary on the 1982 UNCLOS* notes, ‘...in return for the extension of the continental shelf 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.’<sup>5</sup> The esteemed editors 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 a (deep sea bed) Area 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 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.’<sup>6</sup> This view accords with the common position adopted by the African States that participated in the negotiations to the Convention on this issue. Egede, for example, observes 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*.<sup>7</sup> Article 82 thus provides for the application 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.’<sup>8</sup>
- 1.4** 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

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<sup>3</sup> Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.

<sup>4</sup> 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 Sea*, Vol.1, Hague Academy of International Law, Dordrecht: Martinus Nijhoff (1991) 315-381, at 377.

<sup>5</sup> Full title: *United Nations Convention on the Law of the Sea: A Commentary*, edited by Satya N. Nandan and Shabtai Rosenne, Vol.II (1993) at p.932, para.82.1.

<sup>6</sup> E.D. Brown, *The International Law of the Sea, Volume 1: Introductory Manual*, Aldershot: Dartmouth (1994) at 262.

<sup>7</sup> Edwin Egede, ‘The Outer Limits of the Continental Shelf: African States and the 1982 Law of the Sea Convention’, *Ocean Development and International Law*, Vol.35 (2004) 157-178, at 158, citing official statements by African States participating in the Conference and recorded in UNCLOS III, *Official Records*, Vol.II, at 160-165.

<sup>8</sup> Shigeru Oda, *International Control of Sea Resources*, reprint with new Introduction, Dordrecht: Martinus Nijhoff (1989) at xxxii.

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 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.

- 1.5 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.
- 1.6 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 implementation of Article 82 will be examined. Third, the possible settlement of any disputes arising from the interpretation and implementation of Article 82 under Part XV of the 1982 UNCLOS will be considered.

## **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 specific analysis. The main issues arising are those concerning the definition and interpretation of these certain words and phrases, as well as the implementation 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 and 1994 Agreement. 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 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). The general rule of treaty interpretation provided in Article 31 of the 1969 VCLT makes reference to the principle of ‘good faith’. It is also significant to note that Article 300 of the 1982 UNCLOS 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 This principle of good faith, coupled with its attendant principle of the ‘non-abuse of rights’ under Article 300 of the 1982 UNCLOS, is a vital aid to the interpretation of Article 82 of the same treaty. 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 of these provisions.

2.6 Furthermore, as certain terms and phrases within Article 82 have accepted meanings within the international 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.<sup>9</sup> However, caution has also been expressed as to whether the utilization of terms and phrases common to the petroleum industry should necessarily have the same implications for the exploration and exploitation of ‘mineral’ resources that are not necessarily 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 to make ‘payments or contributions in kind’ is imposed on the coastal State, rather than any other entity, such as the actual producers of the ‘non-living resources’ within the OCS concerned.

*Conclusion 1: The obligation to make ‘payments or contributions in kind’ rests solely with the ‘coastal State’ and not with any other entity that may be involved in the exploitation of the non-living resources of the OCS.*

2.8 Moving on to Article 82(2), 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 means the total production at that site. The fact that the ‘payments or contributions’ are to be made with respect to ‘all’ production also precludes the possibility of the coastal State concerned using the lower, net value of such production after deducting its own royalties and/or taxes. Thus, the ‘payments or contributions’ concerned shall be made according to the gross value of the total production at a ‘site’.

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<sup>9</sup> See, for example, George Mingay, ‘Article 82 of the LOS Convention – Revenue-Sharing – The Mining Industry’s Perspective’, *International Journal of Marine and Coastal Law*, Vol.21, No.3, 335-346.

*Conclusion 2: The term 'all' production at a site refers to the gross, rather than net, value of the total production of the non-living resources obtained from that site.*

2.9 A further question relates to the definition of the 'site' from which 'all' production is obtained. In the context of the non-living resource exploitation of the continental shelf, there is no settled definition as to what constitutes a 'site'. Within the 1982 Convention and 1994 Implementation Agreement, the term 'mine site' is utilized to designate the actual site in which deep sea-bed mining operations are taking place but this term is not objectively defined.<sup>10</sup> Moreover, this term is clearly meant to apply only to 'mine sites' in the Area (beyond the limits of national jurisdiction). The question therefore arises as to whether, and to what extent, the coastal State has discretion to designate the appropriate 'site' from which 'all' production is obtained. Specifically, is the coastal State allowed to designate the 'site' from which 'all' production is obtained within the 200M limit, even if at least some of the total production concerned is obtained from beyond the 200M limit. While the coastal State retains discretion over the designation of the 'site', this discretion does not allow the coastal State concerned to escape its obligation to make the required 'payments or contributions' for that portion of the non-living resources obtained beyond the 200M limit. This is because the coastal State's obligation under Article 82(1) is attached to the exploitation of the non-living resources beyond the 200M limit, rather than the precise location of the 'site' from which the 'production' of these resources is obtained.

*Conclusion 3: Whereas the actual designation of a production 'site' for the exploitation of the non-living resources beyond 200M limit is within the discretion of the coastal State concerned, the exercise of this discretion does not allow the coastal State to escape its obligation under Article 82(1) to make 'payments or contributions' for the exploitation of any non-living resources from the continental shelf beyond the 200M limit.*

2.10 The nature of the required 'payments' to be made by the coastal State is also not defined within the 1982 UNCLOS. As these payments will be distributed through the ISA to developing States under Article 82(4), such 'payments' must be in the form of an internationally exchangeable currency, or a related type of convertible payment unit, for example, the Special Drawing Rights (SDRs) used by the International Monetary Fund (IMF).<sup>11</sup>

2.11 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'. 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.<sup>12</sup> The coastal State therefore also has discretion over the nature or type of the 'contribution in kind' that is required, subject to the requirement 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' 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.

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<sup>10</sup> See, for example, Article 17(2)(f) of Annex III and Article 11(3)(a) of Annex IV to the 1982 UNCLOS, as well as paragraph 3 of Section 2 of Annex III to the 1994 Implementation Agreement. See also paragraph 9(a) of Resolution II Governing Preparatory Investment in Pioneer Activities Relating to Polymetallic Nodules in Annex I of the Final Act of the Third United Nations Conference on the Law of the Sea (UNCLOS III).

<sup>11</sup> For example, the 1969 Civil Liability Convention (hereinafter, 1969 CLC) originally used the "Poincaré franc", based on the "official" value of gold, as the applicable unit of account. However, experience showed that the conversion of this gold-franc into national currencies was becoming increasingly difficult. The 1976 Protocol to the 1969 CLC provided for a new unit of account, based on the Special Drawing Rights (SDR) as used by the International Monetary Fund (IMF). The exchange rate for currencies versus the SDR fluctuates daily. However, in order to cater for those countries which are not members of the IMF and whose laws do not permit the use of the SDR, the Protocol provides for an alternate monetary unit - based, as before, on gold. The daily conversion rates for Special Drawing Rights (SDRs) can be found on the International Monetary Fund website at <http://www.imf.org/>

<sup>12</sup> Michael Lodge, 'The International Seabed Authority and Article 82 of the United Nations Convention on the Law of the Sea', *International Journal of Marine & Coastal Law (IJMCL)* Vol.21, No.3 (2006) 323-333.

2.12 Neither does Article 82 specify any particular method for calculating the ‘payments or contributions’ to be made, beyond providing that the *rate* of this ‘payment or contribution’ shall be 1 per cent of the ‘value or volume of production at the site’ in the sixth year of production at that site. It should be noted that coastal States often require the value of petroleum production within their jurisdiction to be calculated on a daily basis within their domestic petroleum taxation and royalty regimes, based on the international market price for crude oil on that day. However, there is no explicit requirement for the coastal States to apply a similar (daily) valuation method for the purposes of fulfilling their obligation under Article 82, especially bearing in mind that the ‘payment or contribution’ based on the ‘value or volume of production’ at a site need only to be made annually (see: para.2.15, below). By analogy, under Article 13(5) and 13(6) of Annex III of the 1982 UNCLOS, for the purposes of making payments to the (International Sea-bed) Authority from the commercial minerals production in the Area, the market value shall be ‘...the average price for those (processed) metals during the relevant accounting year,...’ Thus, in the absence of an explicitly provided method for calculating ‘the rate of payment or contribution’ under Article 82(2), the coastal State has the discretion to opt for an internationally recognised and acceptable method of calculation that is appropriate to its own policies and needs. However, the Committee held that whichever calculation method the coastal State utilized in this regard should be communicated to the ISA as the designated recipient of these ‘payments or contributions in kind’.

*Conclusion 4: The coastal State can decide the method it will use to calculate ‘the rate of payment or contribution’ under Article 82(2), subject to communicating this method to the International Sea-bed Authority as the designated recipient for these ‘payments or contributions in kind’. (See also Conclusion 7)*

2.13 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’. It would seem that the coastal State has the discretion to decide whether to fulfil its general obligation under Article 82(1) by making either ‘payments or contributions in kind’, subject to the *practical* (as opposed to *legal*) requirement to negotiate with the International Sea-bed Authority (ISA) as the initial recipient of these ‘payments or contributions in kind’. Moreover, Article 82(4) does not specify whether the Authority, as the initial recipient of these payments or contributions, can decide whether the coastal State’s obligation is to be fulfilled by *either* payments *or* contributions in kind.

2.14 However, within Article 82(2), the provision for the calculation of the ‘rate of payment *or* contribution’ (emphasis added) suggests that once the coastal State has made its choice as to its preferred mode of fulfilling its obligation, whether by ‘payments’ *or* ‘contributions in kind’, then it is precluded from making a *combined* ‘payment’ *and* ‘contribution in kind’ to fulfil its obligation under Article 82. Moreover, Article 82(4) also provides for the ‘payments *or* contributions’ to be made ‘through’ the Authority, thereby suggesting that the coastal State’s obligation can be fulfilled by *either* payments *or* contributions, but arguably not both at the same time. 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).

*Conclusion 5: The coastal State has the choice of making ‘payments **or** contributions in kind’ to fulfil its obligation under Article 82, but it cannot decide to make a **combined** ‘payment’ **and** ‘contribution in kind’.*

2.15 A further issue that arises is as to the timing of the payments or contributions in kind. Article 82(2) provides that these ‘payments and contributions shall be made annually with respect to all production at a site.’ 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.’<sup>13</sup> As the requirement to make payments or contributions is only on an annual basis, it follows that the coastal State has the discretion to decide as to precisely *when* in any particular calendar or financial

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<sup>13</sup> 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.

year it will make these ‘payments or contributions’. In this context, the ISA can again rely on its role as the explicitly designated international organization for the receipt and transfer of the ‘payments or contributions’ to enable it to negotiate with the coastal State concerned on all *practical* (as opposed to *legal*) aspects for the receipt of such ‘payments or contributions’. Both the principles of good faith and non-abuse of rights provided in Article 300 of the 1982 UNCLOS enjoin the coastal State to negotiate with the ISA on both the *mode* and *timing* of these ‘payments or contributions’. Thus, the coastal State’s discretion as to the *timing* of these ‘payments or contributions’ is subject to negotiations with the ISA on the practical aspects of such ‘payments or contributions’.

2.16 What about the role of the recipient States in this matter? In other words, can a land-locked, least developed country (LDC) that is likely to receive a portion of the collected ‘payments or contributions in kind’ specify, for example, that it wants ‘contributions in kind’ - in the form of crude oil shipments, rather than cash payments, as preferred by the coastal State. The lack of an explicit right or role provided to the recipient State in this respect, either here, or elsewhere, within the 1982 Convention and 1994 Implementation Agreement suggest that there is little that the recipient State can require of the coastal State in this context. Here, unlike in the case of the ISA, there is no explicit provision for any role to be played by the recipient States, beyond their participation of the elaboration of the ‘equitable sharing criteria’ by the ISA (explicated below in Section 3) as ‘the basis’ for its distribution of the payments or contributions to these States. Thus, the 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 6: 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 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 or contributions, can overturn the discretion afforded to the coastal State in this respect. However, as the designated recipient of the payments or contributions made, the ISA can express its view on the latter two issues: the **method** and **timing** of the payments and/or contributions, to the coastal State concerned. Furthermore, the coastal State’s discretion as to the **form, method** and **timing** of the payments or contributions is circumscribed by general principles of ‘good faith’ and ‘non-abuse’ of rights, as well as generally applied international industrial standards and procedures.*

2.17 Notwithstanding the discretion afforded to the coastal State to fulfil its primary obligations under Article 82, the Committee held that certain secondary obligations implicit in the implementation of these primary obligations, as well as progressive developments in general international law, can be relied on to impute a further, reporting requirement upon the coastal State concerning these primary obligations.

*Conclusion 7: The coastal State should report on its implementation of the obligations under Article 82, especially in respect of the following three issues: a) the starting date for exploitation of the non-living resources from the OCS; b) the total annual production of the non-living resources from the OCS for the purpose of calculating the value or volume of the ‘payments or contributions in kind’ required to be made ‘through’ the ISA, under Article 82(4); c) the method applied by the coastal State for determining the value or volume of the ‘payments or contributions in kind’ to be made.*

2.18 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...’

2.19 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. One view expressed within the Committee is to 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. In any case, all such ‘non-living’ resource exploitation by the coastal State, even if not ‘mineral’ in nature, is still 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).

2.20 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 agreed 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 8: 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 or contributions in kind under Articles 82(1) and 82(2).*

2.21 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.<sup>14</sup> 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.<sup>15</sup>

2.22 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

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<sup>14</sup> 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.

<sup>15</sup> 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>.

how it should be interpreted, subject to the general principles of good faith and non-abuse of rights highlighted above as being applicable in these situations.

2.23 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 9: 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 and interpretation 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 of the ‘payments or contributions in kind’ made by coastal States, as well as their disbursement among the recipient ‘States Parties’. 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 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 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 prioritization factors within the development of the ‘equitable sharing criteria’ for the distribution of the payments or contributions under Article 82(4), as opposed to the financial and other economic benefits derived from activities in the Area, which must be equitably shared on a non-discriminatory basis under Article 140(2) of the 1982 UNCLOS, suggests that two separate sets of criteria to be developed and applied for each stream.

*Conclusion 10: 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 the equitable sharing of 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. This difficulty is exacerbated when it is considered that Resolution III within Annex I to the Final Act of UNCLOS III declares in paragraph 1(a) that ‘(I)n the case of a territory whose people have not attained full independence or other self-governing status recognized by the United Nations, or a territory under colonial domination, provisions concerning the rights and interests under the Convention shall be implemented for the benefit of the people of the territory with a view to promoting their well-being and development.’

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 11: 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.*

#### **4.0 The Settlement of Disputes arising from the Interpretation and Implementation of Article 82**

4.1 A situation may emerge where a coastal State reneges on its obligation to make payments or contributions in kind under Article 82, or a dispute otherwise arises between the State concerned and the International Sea-bed Authority (ISA) as to the payments or contributions in kind received. 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).<sup>16</sup> 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 fulfil its obligations under Article 82. 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 of the 1982 UNCLOS, the scope of which applies only to activities in the Area.<sup>17</sup>

4.2 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 sharing criteria’ to be developed by the organs of the ISA,<sup>18</sup> it is arguable that the only entities that can make legitimate claims in the event of any non-payment by the coastal State, or any dispute over the amount or other aspects 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.

4.3 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.<sup>19</sup>

4.4 However, questions can be raised about the jurisdiction of the Sea-Bed Disputes Chamber to hear such requests for an advisory opinion as the preamble to 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.’ Moreover, it is also possible to read the apparent limitation to the Chamber’s jurisdiction under the preamble to Article 187 as in itself being confined to the contentious jurisdiction of the Chamber. Thus, Article 191 (and possibly Article 159(10)) of the Convention) would seem to provide the Chamber with advisory jurisdiction to hear requests from the ISA’s Council or Assembly for advisory opinions on ‘their activities.’ The significant role that the ISA plays as the designated recipient of the ‘payments and contributions in kind’ under Article 82, coupled with the equally significant roles that both the Council and Assembly of the ISA play in establishing the ‘equitable sharing criteria’ for determining the distribution of the ‘payments or contributions in kind’ received, suggest that any disputes arising from these roles are legitimately within the scope of ‘their activities’, according to requirements laid down by the International Court of Justice in its advisory opinion on the *Legality of the Use of Nuclear Weapons by A State in Armed Conflict* (1996).<sup>20</sup>

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<sup>16</sup> Ted L. McDorman, ‘The Entry into Force of the 1982 LOS Convention and the Article 76 Outer Continental Shelf Regime’, *International Journal of Marine & Coastal Law*, Vol.10, No.2 (1995) 165-187, at 175.

<sup>17</sup> Article 134(1) and 134(2) of Part XI of the Convention.

<sup>18</sup> 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.

<sup>19</sup> A further possibility by which the jurisdiction of the Sea-Bed Disputes Chamber to give an advisory opinion can be engaged is through Article 159(10) of the 1982 Convention, which states that: ‘Upon a written request addressed to the President and sponsored by at least one fourth of the members of the Authority for an advisory opinion on the conformity with this Convention of a proposal before the Assembly on any matter, the Assembly shall request the Sea-Bed Disputes Chamber of the International Tribunal of the Law of the Sea (ITLOS) to give an advisory opinion thereon and shall defer voting on that proposal pending receipt of an advisory opinion by the Chamber. ...’

<sup>20</sup> See: *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion 8 July 1996, ICJ Reports (1996) 66, at 78-81, paras.25-26.

*Conclusion 12: 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. 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'.*