



MODULE ADSEA, LESSON 4

EQUITABLE SHARING OF BENEFITS FROM ACTIVITIES IN THE AREA LECTURE NOTES

Lesson outline

Benefit sharing is fundamental to the deep-sea mining regime under UNCLOS. As part of its regulatory responsibility, ISA is required to provide for the equitable sharing of financial and other economic benefits from activities in the Area on a non-discriminatory basis. Detailed rules, regulations and procedures for equitable sharing do not yet exist. However, as the ISA Council advances its work on adopting the necessary regulatory framework that would permit deep-sea mining to begin, the ISA Finance Committee has started to develop proposals for equitable sharing of financial and other economic benefits.

In this lesson, I will try to summarize the main work carried out by the Finance Committee and also unpack some of the key concepts and definitions involved in developing a system for equitable benefit sharing.

I will be referring throughout to two important documents. The first is a major report issued by the Finance Committee in December 2021, and the second is ISA Technical Study No. 31, also published in 2021. Both these documents can be downloaded from the ISA website, and you will find links to them in the reading list for this lesson.

Benefit of (hu)mankind

The status of deep-sea mineral resources as the common heritage of mankind means that these resources must be exploited for the benefit of mankind as a whole.

To implement this statement of principle in practice, it is important to unpack the various elements in detail. We need to understand what constitutes a benefit. What do we mean by mankind as a whole? And what does equitable benefit-sharing mean? What is equity in this context?

First let's consider benefits. Benefits may be monetary or non-monetary. These are described in UNCLOS as 'financial or other economic benefits.'

Monetary, or financial, benefits will eventually flow from deep-sea mining carried out under contract to ISA in the Area. As yet, we do not know the precise nature or extent of these benefits. Most likely, they will be in the form of royalties paid by contractors on the value of minerals extracted from the Area. However, the formula for this is still under discussion in the ISA Council and is not important for the purpose of this lesson.

There are also non-monetary benefits, which may be considered as 'other economic benefits.' These take many forms, and the main ones are listed on the slide. They all stem directly from the mandate of ISA under UNCLOS, and it is important to note that some of these are already being

derived even during the exploration phase.

Thus, ISA is providing training and capacity-building and is also protecting the marine environment through regulation of activities. Exploration produces increased scientific knowledge, which UNCLOS says must be shared through ISA. UNCLOS also provides preferential access to potential mine sites for developing countries, through the reserved area system. This is also an important non-monetary benefit.

Distribution of financial benefits

But for the purposes of this lesson what we are most interested in today is the question of how to distribute the financial benefits that will flow after deep-sea mining starts at commercial scale. UNCLOS and the 1994 Agreement provide some limited guidance.

The first call on any royalties received will go to fund the administrative expenses of ISA. This is prescribed in UNCLOS. At present, ISA is funded by member State contributions, assessed according to the UN scale of contributions, adjusted for differences in membership. As revenue from mining increases, assessed contributions will decrease over time. Eventually, they will be phased out altogether and all the activities of ISA will be funded from royalties from mining.

Second, a portion of the funds must be allocated to the Economic Assistance Fund envisaged under Article 151(10) of UNCLOS and the Section 7 of the annex to the 1994 Agreement.

The purpose of the Economic Assistance Fund is to assist developing countries which suffer serious adverse effects on their export earnings or economies resulting from a reduction in the price of an affected mineral or in the volume of exports of that mineral, to the extent that such reduction is caused by activities in the Area.

The total amount to be diverted to this Fund is to be agreed by the Council. Access to the Fund will be on a case-by-case basis, subject to proof of actual economic impact caused directly by deep-sea mining. The modalities for access to the Fund, including the criteria for determining what constitutes a serious adverse effect, fall within the mandate of the Economic Planning Commission (which is yet to be established).

UNCLOS also stated that some of the revenue could be used to fund the Enterprise. However, this was removed by the 1994 Agreement, which stipulates the opposite. Revenue may not be used to fund the Enterprise.

Equitable sharing rules

The remainder of the revenue must be allocated to mankind as a whole according to equitable sharing criteria. The only guidance in UNCLOS as to what this means is in Article 140, which appears on the slide.

Article 140 almost raises more questions than it answers. Among the key questions are the ones highlighted in red on the slide.

Do we interpret mankind as a whole as including all States or just States Parties? There are arguments both ways. On the one hand, why should non-Parties get the benefits from Part XI without the responsibility of joining ISA? On the other hand, do we consider mankind to be individuals, or States representing their populations?

How do we define developing State? Should we use the generic UN interpretation, or more refined categories such as the World Bank uses? What are relevant 'interests' and 'needs'? And what does the reference to non-independent and non-self-governing status mean in 2021?

In the 1970s, when UNCLOS was negotiated, this clearly referred to entities such as SWAPO, ANC, PLO, the US Trust Territories and even the Cook Islands. The reference was then to General Assembly resolution 1514 (XV), the Declaration on the Granting of Independence to Colonial Countries and Peoples which was adopted in 1960. Now it is much less clear.

And Article 140 does not answer at all the most critical question, which is how do we develop a formula for equitable distribution of financial benefits?

Equity

Equity is a complex and elusive concept. In theory, it can be an abstract moral or ethical construct. In its practical application by governments and institutions to problems of distributing public resources and burdens equity is strongly shaped by context, cultural values, by precedent, and by the specific types of goods and burdens being distributed. Equity can also be subjective, based on revealed preferences of the pool of eligible beneficiaries (i.e., their observed behaviour in other contexts) and exigencies of practical implementation.

In the case of the mineral resources of the Area, which are designated by UNCLOS as the 'common heritage of mankind', we could say that the eligible beneficiaries are the members of ISA (that is, the States parties to UNCLOS) which collectively represent humanity. Since each State party has an equal voice, equity in distribution can be achieved through developing sharing rules that ISA considers appropriate to its needs.

As a general principle, the equitable sharing of resource rents can be based either on the concept of shared ownership, or it can reflect an implicit or explicit desire to redistribute income or wealth, for example from wealthier States to poorer States. In the latter case, shares should be distributed based on some indicator of priority in the redistribution goal, and would, typically, embody some form of progressivity in income that favours poorer States in the distribution scheme.

In stipulating that activities in the Area must be carried out for the "benefit of mankind," irrespective of the geographical location of States, whether coastal or landlocked, UNCLOS implies an underlying shared ownership (by current and future generations) rationale for equitable sharing. At the same time, however, UNCLOS also requires particular consideration to be given to the interests and needs of developing States and of peoples who have not attained full independence or other self-governing status, implying an income redistribution rationale, which we can also call progressivity.

Applying well known economic theories to these principles, the Finance Committee actually developed and tested several alternative distribution formulae. These were based on easily quantifiable metrics such as GNI per capita and share of global population, adjusted by social distribution weights based on the state of development of each country. By adjusting that social distribution weight, one can achieve more, or less, progressivity in the allocation, ensuring that the share of proceeds received by relatively lower-income States parties (as measured against the mean per capita income of all States parties) is higher than the share received by relatively higher-income States parties.

The preferred formula is discussed in more detail in ISA Technical Study 31. Those who want to delve into this in more detail can also take elective lesson 8 in this module, which discusses equity as a conceptual basis for the development of benefit sharing criteria.

We can also analyze each formula to determine how 'equitable' it is using established measures of relative inequality and impacts upon global social welfare. In this chart, the straight line represents equality, and the closer each curve gets to the straight line, the more 'equitable' it is according to standard measures of equity.

This is certainly a possible way of distributing revenue that would be straightforward to administer and highly transparent.

Alternative means of distribution

But does it even make sense to simply give money directly to national treasuries?

A possible alternative to a simple financial distribution could involve a qualitative distribution of the net financial benefits from recovery of deep-sea minerals through establishing a global fund to invest in knowledge and competence related to the Area. This would also include basic and applied research, capacity-building, and fostering other public goods related to the deep sea.

Here, financial benefits would be used to invest in people and preserve and develop the Area sustainably to maintain its value for future generations. Evidence from multilateral institutions shows how difficult it is to mobilize financial resources for common purposes. This deficit also affects the global ocean beyond national jurisdiction.

Arguably, establishing a global fund is also more in line with a precautionary approach. Improved understanding and knowledge of the deep-sea and its ecosystems ensures rigorous management of the Area and benefits all countries (a global public good) since all depend on the ocean to supply essential ecosystem services.

A resource fund of this type could also provide a mechanism for addressing intergenerational equity by smoothing out the flow of disbursements, delinking disbursements from the dynamics of resource revenue (such as price and revenue pro-cyclicality) and minimizing uncertainty over the overall wealth to be shared. The returns on investment in human, physical, financial and natural capital could be used to finance consumption benefits (through the provision of private and public goods and services) in the future. In this way, with appropriate restrictions on drawing down the fund's principal, the fund could provide a flow of benefits for generations after the cessation of

revenue-producing activities.

Many factors need to be considered in establishing a Seabed Sustainability Fund. These include the institutional and governance arrangements needed to operationalize such a fund. In its report to the Council, the Finance Committee endorsed the application of the evolutionary approach to the governance of the fund while noting the need to scale up the internal capacity of ISA to manage such a fund over time (ISA 2021a). This approach of using existing institutional mechanisms wherever possible instead of creating new institutions was generally endorsed by the Council and Assembly during their discussions in December 2021.

More fundamentally, the objects and purposes of a fund will need to be clearly defined. Should it be focused on scientific research and capacity-building relating to the deep sea, or should it have broader objectives? Delegations participating in December 2021 sessions of the Council largely supported the concept of a fund to advance marine scientific research to promote increased knowledge and sustainable use of the resources of the ocean and the protection and preservation of its biodiversity and enhance available technology for the effective protection of the marine environment, capacity building and transfer of technology. Some delegations and groups considered that the fund should be more broadly conceived to finance global public goods, such as climate change mitigation and the eradication of infectious diseases. Others emphasized the priority objective of increasing knowledge and protecting marine biodiversity in areas beyond national jurisdiction. A suggestion was also made that the fund could support the establishment of regional marine scientific and technological centers as reflected in UNCLOS, Articles 276 and 277. In this connection, some delegations also emphasized the need to consider the vulnerability of States such as Least Developed Countries, Landlocked Developing Countries and Small Island Developing States.

Article 82(4)

I now want to move on and talk briefly about another form of equitable distribution, which is equitable distribution under Article 82(4) of UNCLOS.

Article 82 provides for a system of revenue sharing between coastal States and the international community. It provides that payments or contributions in kind are to be made by coastal States in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles. Those payments or contributions in kind are to be distributed by the ISA to developing States, 'particularly the least developed and the land-locked amongst them'.

For those interested, there is a separate elective lesson in this module on all issues relating to Article 82. In this lesson I will only address the question of how distributions of Article 82 differ from distributions of revenue from deep-sea mining.

There are two critical differences to note.

First, Article 82(4) revenue is distributed through the Authority direct to member States. ISA acts simply as an administrator, and there is no possibility of using Article 82(4) revenue for a sustainability fund or for compensating land-based producers.

Second, the priority of the beneficiaries under Article 82(4) are different, in that priority is given to the least developed and land-locked developing countries. This is not quite straightforward. Does it mean least developed and landlocked as two separate categories, with equal preference? Or that States which are BOTH least developed AND landlocked have even more priority? The image shows that the categories are quite different.

This can be discussed and negotiated, but in any case it seems clear that in contrast to Article 140, where the remedial effect is socio-economic and redistributive, the intended effect of Article 82(4) is redistributive and geographic.

It is not too difficult to capture this using the same distribution formula developed for Article 140 but adjusting the social distribution weights to favour the specified countries. It is important to note, however, that favouring one group of countries inevitably means that others will lose out in comparison.

I must emphasize again that no decision has been reached on any of this.

Conclusion

The 2021 report of the Finance Committee was an important step forward in establishing the conceptual basis for equitable sharing and proposing alternative formulae for allocations.

Ultimately, equitable benefit-sharing rules must be approved by the ISA Assembly on the recommendation of the Council. Both the Council and the Assembly must take into account the recommendations of the Finance Committee on these matters.

There was a generally positive response to the proposal to establish a Seabed Sustainability Fund as an alternative to direct distribution of funds and the Committee was asked to further elaborate the objects and purposes of the Fund, including mechanisms for its operation and governance. This will be done in 2022 and 2023.

Meanwhile, Article 82(4) requires separate consideration, and this issue will also be placed on the agenda for the Finance Committee.