



MODULE ADSEA, INTRODUCTION

INTRODUCTION - EQUITABLE BENEFIT SHARING UNDER UNCLOS.

LECTURE NOTES

My name is Michael Lodge. It's my pleasure to make this short presentation on the subject of equitable benefit sharing under UNCLOS. 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. This concept is fundamental to the deep-sea mining regime under UNCLOS. In pursuance of this principle, UNCLOS requires ISA to provide for the equitable sharing of financial and other economic benefits on a non-discriminatory basis. 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 presentation, I will try to summarise 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. We need to understand what constitutes a benefit and what do we mean by mankind as a whole? And what does equitable benefit sharing mean? What is equity in this context?

The presentation is based around two key documents, which I would refer you to if you want to find out more. One is a major report issued by the Finance Committee on equitable benefit sharing in December 2021 and the other is a technical study on the issue published by ISA. 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 derive from the royalties paid on deep sea mining. The formula for these royalties is still under discussion in the ISA Council and I will not say anymore about that now, but there are also non-monetary benefits which may be considered as other economic benefits. These take many forms and I've listed the main ones 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.

But 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 Issa. 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 overtime. Eventually they will be phased out all together 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 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. Note that the amount to be diverted to this fund is to be agreed by the Council and access to the fund will be on a case-by-case basis, subject to the proof of actual economic impact caused directly by deep sea mining. The modalities for access to the Fund, including the criteria for determining serious adverse effects, 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. 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 users? What are relevant interests and needs? And what does the reference to non-independent and non-self-governing status mean in 2022? In the 1970s, when UNCLOS was negotiated, this clearly referred to entities such as SWAPO, ANC, the PLO, the US Trust Territories and even the Cook Islands. The reference was then to General Assembly Resolution 1514, 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 what is the formula for distribution, leaving it to any appropriate mechanism as long as it is non-discriminatory.

It is of course possible to develop a formula based on well understood economic theory. It is not difficult, but there are some key ethical decisions to make. For example, should the objective be one of wealth redistribution from rich to poor, which we can call progressivity, or should it be based around relative rights of ownership as reflected in population size or GDP, for example? The literature gives us plenty of examples where scarce good need to be distributed according to some form of equitable criteria. Whether we are talking about kidney transplants, access to vaccines and so on.

Article 140 itself seems to imply that the desired impact is socioeconomic and redistributive in its reference to the interests and needs of developing countries. So, without going into unnecessary detail, the Finance Committee actually developed and tested several alternative distribution formulae. These were all 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 distribution² weight, one can achieve more or less

progressivity in the allocation.

The preferred formula is shown here and is explained in more detail in ISA Technical Study 31. We can also analyse each formula to determine how equitable it is. So, 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. But does it even make sense to simply give money directly to national treasuries?

A possible alternative could be to put the revenue into a global fund, which the Finance Committee suggested calling, a Seabed Sustainability Fund. We already know that deep sea research and Environmental Protection are hugely underfunded, so a Seabed Sustainability Fund could be used to support various measures such as capacity development, environmental management, scientific research or even the establishment of regional centres. This is of course a new idea that still needs a lot of development. It also raises a lot of questions about governance, management and administration of such a fund and how to ensure equity in access to the fund.

However, so far the reaction has been positive and the Finance Committee has been asked to further develop the concept. And I want to move on and talk 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 landlocked amongst them.

There are two critical differences to note between distribution under Article 140 and distribution under Article 82 (4). 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 landlocked 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 socioeconomic 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 emphasise again that no decision has been reached on any of this.

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.

Well, I hope this presentation has given you some insight into the provisions of Part XI relating to benefit sharing. It remains work in progress and we welcome new ideas, but consideration of this issue forms part of the ISA strategic plan for the period 2019 to 2023. It is also relevant in other contexts, including, for example, the BBNJ negotiations.

I hope I have given you some food for thought and I thank you for your attention.