DEVELOPMENT OF GUIDELINES FOR THE IMPLEMENTATION OF ARTICLE 82

WORKING PAPER

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October 2012
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**Annex:** Framework for a Model Article 82 Agreement between an OCS State and the International Seabed Authority on the Implementation of Article 82
EXECUTIVE SUMMARY

This document is an issues paper concerning the implementation of Article 82 of the United Nations Convention on the Law of the Sea, 1982 (LOS Convention). It was commissioned by the International Seabed Authority to assist discussion at an international workshop in Beijing in November 2012.

Article 82 contains a duty on States to make payments or contributions in kind with regard to production from non-living resources of the outer continental shelf (OCS), i.e., areas beyond the 200-nautical mile limit and up to the seaward limits of the continental shelf defined according to Article 76. A relationship is created between States having this obligation (OCS States) and the Authority as the institution tasked with receiving payments and contributions for distribution to other States Parties. The LOS Convention provides little guidance on the implementation of Article 82 by OCS States and the Authority.

At an international seminar at Chatham House, London, in 2009, it was recommended that the anticipated relationship between an OCS State and the Authority should be governed by a novel bilateral international agreement. It was further recommended that the Authority consider developing implementation guidelines and in particular to take the initiative to develop a “Model Article 82 Agreement” to facilitate the administration of the relationship in consultation with OCS States and other States Parties to the LOS Convention.

This Working Paper explores a possible framework for a Model Article 82 Agreement and identifies issues and questions for further discussion at the Beijing workshop. The paper identifies considerations in the international law of treaties, especially with regard to agreements between States and international organizations that potentially assist the framing of the relationship. The paper notes that while some of the gaps in Article 82 are essentially of an administrative nature and can be addressed in the Agreement, there are likely other substantive issues that may need to be referred to States Parties to the LOS Convention (SPLOS) for further guidance.

The central focus of the Working Paper is a framework for the proposed Agreement. It would include preambulatory and operative clauses. The latter would consist of clauses grouped under the following themes: use of terms and scope; Convention duties; provisions common to both payments and contributions in kind; provisions regarding payments; provisions regarding contributions in kind; interruption or suspension of production; monitoring and confidentiality of data and information; interpretation and dispute settlement; and final provisions.

Several major questions are posed for discussion with regard to: identification of substantive issues which require guidance from SPLOS; usefulness of the framework Model Article 82 Agreement and how it can be improved; whether OCS States should be encouraged to opt only to make payments; how the Authority should take delivery of contributions in kind where an OCS State uses this option; potential monitoring role for the Authority; and approach to the settlement of disputes between OCS States and the Authority. The paper concludes by noting that the Authority should be expected to incur costs in the administration of Article 82 Agreements and invites workshop participants to consider how such costs might be recovered.
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### ACRONYMS AND ABBREVIATIONS

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<td>Model Article 82 Agreement discussed in this Working Paper</td>
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<td>Area, the</td>
<td>International Seabed Area</td>
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<td>Authority, the</td>
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<td>EEZ</td>
<td>Exclusive economic zone</td>
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<td>ITLOS</td>
<td>International Tribunal for the Law of the Sea</td>
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<td>OCS</td>
<td>Outer continental shelf (continental shelf areas beyond the 200-nautical mile limit and up to the outer of the continental margin as defined by Article 76)</td>
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<td>A State that has an outer continental shelf</td>
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<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
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<td>VCLT 86</td>
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1. INTRODUCTION

The purpose of this Working Paper is to invite discussion on how Article 82 (Table 1) of the United Nations Convention on the Law of the Sea, 1982 (LOS Convention)\(^1\) might be implemented. It builds on two earlier technical studies published by the International Seabed Authority (the Authority), in particular a study on the legal aspects of the implementation of Article 82.\(^2\) The Working Paper has been prepared as an “issues paper” to serve as a background document for the “International Workshop on the Implementation of Article 82 of the United Nations Convention on the Law of the Sea,” forthcoming in Beijing, China, on 25-30 November 2012.

Table 1: Article 82

<table>
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<th>Payments and contributions with respect to the exploitation of the continental shelf beyond 200 nautical miles</th>
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<tr>
<td>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.</td>
</tr>
<tr>
<td>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 1 per cent of the value or volume of production at the site. The rate shall increase by 1 per cent for each subsequent year until the twelfth year and shall remain at 7 per cent thereafter. Production does not include resources used in connection with exploitation.</td>
</tr>
<tr>
<td>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.</td>
</tr>
<tr>
<td>4. The payments or contributions shall be made through the Authority, which shall distribute them to States 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.</td>
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</tbody>
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Table 2: Template of Article 82

<table>
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<th>Nature of rule</th>
<th>Rule</th>
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| Basic rule                 | The OCS State shall make payments or contributions in kind in respect of the exploitation of non-living resources of the OCS. | OCS State has a choice between making (1) payments or (2) contributions in kind.  
Payments and contributions relate to non-living resources.  
Payments and contributions relate to exploitation leading to production. |
| Collateral rules           | Payments or contributions shall be made annually.                    | Payments or contributions shall be made regularly on an annual basis.    |
| concerning payments or     | Payments or contributions shall be made with respect to all production. | Payments and contributions are to be based on all production.            |
| contributions in kind.     |                                                                      | Payments and contributions shall be calculated on the value or volume of production.  
Production does not include resources used in connection with exploitation. |
|                           | Payments or contributions commence on the sixth year of production and are based on a pre-set scale. | Grace period: obligation to make payments or contributions does not apply to the first five years of production.  
Pre-set scale: payments and contributions commence on the sixth year of production, on a scale starting at 1% of production in the sixth year and increasing by 1% per year until it reaches 7% in the twelfth year, which thereafter shall remain the ceiling. |
| Collateral rule            | Net importing OCS developing States are exempted from making payments or contributions. | Exemption for OCS developing States: if a developing OCS State imports more of the resource subject to payments or contributions than it exports, it is exempted from the obligation in relation to that resource. |
| concerning eligibility to  |                                                                      |                                                                         |
| make payments and          |                                                                      |                                                                         |
| contributions.            |                                                                      |                                                                         |
| Collateral rule            | Payments and contributions are to be made through the Authority, which shall distribute them to States Parties. | Payments or contributions are to be made through the Authority.          |
| concerning distribution    |                                                                      |                                                                         |
| of benefits.              |                                                                      |                                                                         |

Although it is an integral part of the package deal in the LOS Convention, Article 82 has remained largely dormant because to date the anticipated conditions to bring it into effect have not yet materialized. The general scheme of the provision is set out in Table 2. Article 82 introduces an obligation on States enjoying outer continental shelves (OCS States) to make specified payments or contributions with regard to production from non-living resources of their
continental shelves outside the 200-nautical mile limit, i.e., the outer continental shelf (OCS, also known as extended continental shelf). The payments and contributions are to be made through the Authority for eventual distribution to other State Parties in accordance with the Convention. The key anticipated condition that will trigger the obligation is occurrence of production.

The provision essentially consists of a basic rule (i.e., the duty to make payments or contributions) and a series of collateral rules designed to give further substance and process to the basic duty. Even taking into consideration the basic and collateral rules, the Convention is largely silent on how Article 82 is to be implemented. What is clear is that qualifying OCS States and the Authority are assigned responsibilities for its implementation.

This Working Paper is an initial attempt at exploring how OCS States and the Authority might approach the task of implementation. While both OCS States and the Authority are assigned individual responsibilities, the performance of aspects of their respective responsibilities necessitates interaction and coordination between them.

The focus of the Working Paper is on aspects of Article 82 where the responsibilities of OCS States and the Authority meet and interact. The paper explores possible structure and process to assist that interaction. Article 82 is unprecedented and therefore there is little substantive practice to guide implementation. Hence the working paper poses questions for discussion in exploring possible directions for implementation, including the development of guidelines.


Given the likely long-term relationship between producing OCS States and the Authority, as well as the uncertainties identified in this report, it is advisable for a producing OCS State and the Authority to enter into an Article 82 agreement. For this purpose, and in anticipation of the operationalization of Article 82, it is advisable that the OCS States and the Authority formulate a “Model Article 82 Agreement,” within the framework of the LOS Convention, and upon which Authority/OCS State-specific agreements would be entered into in the future. Such an agreement would perform the function of an OCS royalty agreement and be the basis upon which the respective responsibilities in Article 82 (insofar as the making and handling of payments and contributions are concerned) can be coordinated and administered. It is advisable for the Authority to take the lead in developing such a model agreement, in close cooperation with experts from OCS States and other States Parties of the LOS Convention.

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3 Note that not all producing OCS States will have this obligation. LOS Convention, supra note 1, Art. 83(3).
4 The only practice to date is the United States’ with regard to Stipulation 10 inserted in leases in the Gulf of Mexico. This practice concerns additional domestic royalty to be levied if the United States becomes a party. Although the practice might provide guidance for the domestic implementation of Article 82, it falls short of guiding the administrative aspects of a relationship between an OCS State and the Authority. Moreover, the United States is not a party to the Convention. See Technical Study No. 4, supra note 2, at 5-8.
5 Technical Study No. 4, ibid., at xvii-xviii.
The principal purpose of this Working Paper is to further develop the concept of a “Model Article 82 Agreement” as an administrative framework and tool for the implementation of those aspects of Article 82 that concern the making of payments and contributions in kind by the OCS State and the Authority’s responsibilities in receiving them.

2. BACKGROUND

Articles 82 and 76 were closely inter-linked during negotiations at the Third United Nations Conference on the Law of the Sea, 1973-1981 (UNCLOS III). The Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil thereof, beyond the Limits of National Jurisdiction, 1970 declared that the seabed and subsoil beyond national jurisdiction was common heritage of mankind and that no State could appropriate it. Areas beyond national jurisdiction would be developed in the interests of mankind and the ensuing benefits would be shared by all States, taking into particular consideration the interests and needs of developing countries.6

During UNCLOS III coastal States were successful in arguing for new and extensive maritime zones, in particular the 200 nautical mile exclusive economic zone (EEZ) and the OCS. Specifically with regard to the OCS, the more the outer limit was moved seawards, the more this occurred at the expense of the extent of the international seabed area. Many States, especially land-locked and geographically disadvantaged, objected to encroachments on the Area. Towards the final stages of the Conference a compromise was needed to ensure broad support for Article 76 and achieve consensus on the final package deal. Article 82 was a key element in the trade-off. A finalized Article 76 introduced rules and a procedure for the definition of the outer limits of the OCS and accompanied by the duty to deposit a copy of charts showing the geographical coordinates of the outer limits of the OCS to the Authority.7 Article 82 applied to any future production of non-living resources of the OCS and provided for the distribution of benefits to other State Parties and beneficiaries designated by the Convention, such as developing States, especially the least developed and land-locked States. The Authority was charged with the central role, and responsibility, in receiving the payments and contributions established by Article 82 and in developing equitable criteria for the distribution of those benefits.

In addition to providing rules and procedure for the definition of the outer limits of the continental shelf and thereby ascertain the full extent of coastal State sovereign rights and jurisdiction, a consequence of Article 76 is to identify candidate continental shelf areas for Article 82 purposes. At the time of preparation of the Working Paper, there were 61 submissions to the Commission on the Limits of the Continental Shelf submitted in accordance with Article 76.8 An additional 45 communications to the Commission provided preliminary information.9

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7 LOS Convention, supra note 1, Art. 84(2).
8 Several States made more than one individual or joint submission for different OCS areas. Division for Ocean Affairs and the Law of the Sea, online: http://www.un.org/Depts/los/clcs_new/commission_submissions.htm.
Both OCS States and the Authority need to consider how Article 82 will affect them. The OCS States making submissions to the Commission need to be aware of the implications of this provision. At this time very few coastal States possessing an OCS have granted exploration and discovery licences to offshore operators. No production licences appear to have been issued. However, recent offshore deep water activity suggests that the expectation of resource discoveries holding promise for commercial production on the OCS is realistic.

As the institution charged by the Convention to receive payments and contributions and distribute these to designated beneficiaries, the Authority has substantial responsibilities to discharge. They require advance planning and preparation. For example, the Authority needs to set up structures and processes to enable it to receive payments and contributions in kind. The latter consists of a share of the produced resource. At this time, the Authority does not have the capacity to perform such tasks. It has not developed policies, rules and procedures to guide it in interacting with OCS States with regard to Article 82. Further, because the Authority is responsible for receiving payments and contributions from OCS States and for distribution of these benefits to States Parties to the Convention, it has as yet to develop criteria for distribution. The LOS Convention requires the Authority to develop rules, regulations and procedures in this regard. The Council, the executive organ of the Authority, is tasked with the recommendation of rules, regulations and procedures to the Assembly for the distribution of benefits on an equitable basis. The Legal and Technical Commission is the likely body that will develop regulatory proposals for the Council. The Assembly is the organ that ultimately considers and approves rules, regulations and procedures recommended by the Council. Once adopted, they become rules of the Authority. These tasks can be expected to take time because there will need to be

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9 Numerous States, especially developing, were unable to make submissions within the stipulated 10-year deadline from when the Convention entered into force in their regard. A Meeting of States Parties to the Convention decided that, pending the making of formal submission, provision of preliminary information on their expected OCS submission would have the effect of meeting the deadline requirement. See: Meeting of States Parties, SPLOS/183, 24 June 2008 SPLOS/183, Decision regarding the workload of the Commission on the Limits of the Continental Shelf and the ability of States, particularly developing States, to fulfil the requirements of article 4 of Annex II to the Convention, as well as the decision contained in SPLOS/72, paragraph (a), online: http://www.un.org/Depts/los/meeting_states_parties/documents/splos_183e_advance.pdf; and SPLOS/72, 29 May 2001, Decision regarding the date of commencement of the ten-year period for making submissions to the Commission on the Limits of the Continental Shelf set out in article 4 of Annex II to the United Nations Convention on the Law of the Sea, online: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/387/64/PDF/N0138764.pdf?OpenElement.

10 LOS Convention, supra note 1, Art. 162(2)(o)(i).

consultations not only with OCS States but also more generally with States Parties to the LOS Convention.

3. RELATIONSHIP BETWEEN OCS STATES AND THE INTERNATIONAL SEABED AUTHORITY

Article 82 anticipates interaction between OCS States and the Authority. The interaction appears to be primarily of an administrative nature: the Authority receives payments and contributions from OCS States. The Convention is silent on the structure and process of this relationship. The only other text in the Convention which implies a process in the implementation of Article 82 is internal to the Authority, i.e., with reference to the recommendation and adoption of rules, regulations and procedures for the equitable sharing of payments and contributions.

In Technical Study No. 4 the implementation of Article 82 is envisaged in three phases. The first phase is described as a “pre-production period” covering the “prospecting, exploration and development licences or leases, but before commencement of commercial production.” During this period there is no performance of responsibilities assigned to OCS States and the Authority. However, this period provides an opportunity for OCS States to anticipate the future obligation to make payments and contributions. Similarly, the Authority is in a position to prepare for the future discharge of its responsibilities by designing the procedures necessary to perform its mandate.

The second phase launches with the commencement of actual production and covers the first five-year production period. This represents the “grace period” provided in Article 82. Technically, Article 82 becomes effective in this period in the sense that the Convention provides a notional count-down to maturity.

The third phase commences on the sixth year of production and represents the period when the duty to effect payments and contributions matures. This phase is described as the “OCS royalty period” commencing with the sixth year of production. This period will see annual royalty rate increments of 1% until the ceiling of 7% is reached on the 12th year and will remain at that level for the remaining period of production.

This conceptualization of phases is useful to better locate and time implementation tasks and ultimately situate the proposed Model Article 82 Agreement. This approach provides the missing structure and process to the relationship between the OCS State and Authority. It is intended to be of assistance to OCS States and the Authority.

In terms of timing for commencement of planning for future implementation, it is suggested that Phase I is an ideal period. There is not yet the pressure to deliver on legal obligations under the explicit timeframe in Article 82, thus providing time for consultation and reflection in developing a pragmatic and functional approach.

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12 Technical Study No. 4, supra note 2, 46-47.
5. GENERAL CONSIDERATIONS REGARDING A MODEL ARTICLE 82 AGREEMENT

The Authority, in consultation with OCS States, is well positioned to lead the development of a Model Article 82 Agreement. It will be a party to all the bilateral agreements to be concluded as new OCS areas commence production.

The purpose of the proposed Agreement is to facilitate implementation of the interrelated administrative responsibilities of the OCS State and Authority through a “contractual approach.” The Authority already engages in contractual arrangements with contractors in regard to exploration and deep seabed mining in the Area. The OCS State and the Authority would also address on a bilateral basis the administrative and procedural uncertainties in the LOS Convention regarding how their respective responsibilities are to be performed. It is conceivable that there might be substantive issues concerning the interpretation and application of the LOS Convention, e.g., questions of a legal nature that speak to the rights and responsibilities of States. Where such issues are identified in the process of developing guidelines for the implementation and the Model Article 82 Agreement, they might have to be referred to a meeting of States Parties to the LOS Convention (SPLOS). If States Parties consider substantive interpretation issues to require a higher degree of formal agreement, there are precedents that would support this approach but which would likely require an extended diplomatic process.\(^\text{13}\)

The proposed Agreement is not advanced as a “one size fits all.” It is likely that each administrative relationship between the Authority and a different OCS State will have particular characteristics because of the OCS State’s election to make payments or contributions in kind and the consequences that will flow from that decision. For example if payments are made they potentially could be effected in different currencies, banking arrangements will differ and so on. In the case of contributions in kind the Authority will need to make arrangements for receiving the share of the produced resource. These realities argue for an approach to the development of the Model Article 82 Agreement that takes into consideration the need for (a) common core provisions for all agreements and (b) particular provisions for each agreement. The core provisions would ensure overall consistency and fairness. Some core provisions would naturally be adapted to each State Party. The particular provisions, on the other hand, would properly address the uniqueness of the requirements of implementation in each case.

The Agreement would not address matters of a purely domestic nature with regard to the production from the resource and instead the focus would be exclusively on those aspects of production that are central to the respective responsibilities in Article 82.

The legal status of an agreement between an OCS State and the Authority is that of a treaty between a sovereign State and an intergovernmental organization. As such, it will have specific features which, while informed by general principles of treaty law, will also have particular characteristics. Among the unique characteristics are the engagement of the legal personality of an international organization in accordance with its constitutive instrument, the development of an agreement involving the international organization that will be replicated or adapted to different State Parties, the giving of content to interrelated responsibilities established in a multilateral treaty and an agreement which involves a Sovereign State as a Party in one capacity (as an OCS State) while at the same time being a member of the organization in another capacity (as LOS Convention State Party).

The treaty relationship to be developed will be informed and guided by two key and à propos multilateral instruments: the Vienna Convention on the Law of Treaties, 1969 (VCLT 69) and Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations, 1986 (VCLT 86). The VCLT 69 is in force and widely regarded as having codified the general international law of treaties. Although the VCLT 69 was conceived with inter-State treaty relationships in mind, it does not exclude application of principles to States Parties in regard to treaties that also have an international organization as a party. It is unlikely that the proposed Agreement falls directly within the ambit of the VCLT 69, but in any case the very similar, if not identical, principles of the VCLT 86 are relevant for the Agreement.

Potential concerns to consider in regard to the VCLT 86 is that (a) the Convention is not yet in force, (b) many OCS States are not parties and (c) the Authority is not a party. The Technical Study No. 4 recommended that the Authority consider becoming a party. The VCLT 86 was mandated by the UN General Assembly and was consciously developed by the International Law Commission to track closely the VCLT 69. Gaja writes that “it is likely that at least the

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14 The preamble of the VCLT 86 noted that such agreements have specific features of treaties which involve international organizations as a different type of subjects of international law than States. VCLT 86, supra note 11, preamble.

15 The preamble reiterates “the practice of international organizations in concluding treaties with States or between themselves should be in accordance with their constituent instruments.” VCLT 86, ibid. In the Peace Treaties Case (2nd Phase), the International Court of Justice held that “such a clause was to be strictly construed and could be applied only in the case expressly provided hereby.” The clause concerned the Secretary-General’s power to appoint a tribunal member in a dispute settlement clause in a treaty between States. Advisory Opinion Concerning the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase), 18 July 1950, I.C.J. Reports 1950, p. 221, online: http://www.unhcr.org/refworld/docid/4023a1fa2.html.

16 The preamble provides that “nothing in the present Convention should be interpreted as affecting those relations between an international organization and its members which are regulated by the rules of the organization.” VCLT 86, supra note 11.


18 Art. 3: “the fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law ... shall not affect ... (c) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.” Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 [hereafter VCLT 69]. U.N.T.S. 331 (in force: 27 January 1980).

19 VCLT 86, supra note 11, Art. 3.

20 Through accession under Art. 84, VCLT 86, ibid.
substantive rules which were drafted on the basis of the model of the 1969 Convention will increasingly be considered as equivalent to rules of general international law.”21 The close relationship between the two conventions clearly reflects unity of the treaty law regime.22

Several key treaty law principles will guide the development and implementation of the Agreement. The Agreement will be guided by the principle of good faith in its development and performance.23 It will have a close relationship to the LOS Convention because it can be construed as a step in the performance of an obligation in the LOS Convention.24 Considered on its own merits apart from the LOS Convention, the negotiation (or adaptation of the Model Article 82 Agreement to a given OCS State) will be governed by the good faith principle.25 A party may not invoke an internal rule for the failure to perform a treaty obligation.26 The Agreement would be subject to the principle of non-retroactivity.27

Issues of interpretation should be expected to arise. The interpretation of the Agreement would be similarly guided by the treaty law principle of interpretation in good faith and in light of context, object and purpose.28 The object and purpose are to assist implementation of LOS Convention obligations of the parties. The context of the purpose is clearly the LOS Convention.29 The LOS Convention consists of a package deal that includes a trade-off between Articles 76 and 82 reflecting the rationale behind the making of payments and contributions. It is conceivable that during the performance of the OCS Agreement, the OCS State and the Authority may amend or enter into subsidiary agreements or develop a practice with regard to the implementation of the Agreement. In these cases the interpretation of the OCS Agreement would take into consideration those factors.30 The development of the Model Article 82 Agreement and its adaptation to particular OCS States will also be guided by supplementary means of interpretation.31 Supplementary sources to support the Agreement in the

21 Gaja, supra note 17, at 269.
22 Gaja, ibid., 255.
23 VCLT 86, supra note 11, Art. 26.
24 LOS Convention, supra note 1, Art. 300. The duty includes an obligation to exercise rights that would not constitute “an abuse of right.”
26 VCLT 86, supra note 11, Art. 27.
27 VCLT 86, ibid., Art. 28: “Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.” An interesting consideration could arise with regard to OCS States embark on production from OCS resources prior to becoming parties to the LOS Convention. There could be an issue as to when Article 82 commences to operate with regard to such States. To remove potential uncertainty, the Model Agreement might need to expressly apply retroactively.
28 VCLT 86, ibid., Art. 31. A recent leading text on treaty interpretation to provide guidance on these issues is Richard K. Gardiner, Treaty Interpretation (New York: Oxford University Press, 2008).
29 VCLT 86, supra note 11, Art. 31(2): “The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty …”
30 VCLT 86, ibid., Art. 31(3).
31 VCLT 86, ibid., Art. 32: “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”
implementation of Article 82 are likely to be useful because of the gaps and textual ambiguities in Article 82.

6. FRAMEWORK FOR A MODEL ARTICLE 82 AGREEMENT

6.1 Preambulatory clauses

A preamble in the Agreement would be useful to provide context and rationale and would have value for interpretation purposes. The preamble could include the following invocations by “The Parties to the Agreement”:

- recalling the context and purpose of the LOS Convention;
- noting the existence and purpose of Article 82;
- nothing further that the OCS State and the Authority are assigned responsibilities for the purposes of the provision;
- recognizing that the provision does not set out administrative procedures for the discharge of the responsibilities of the OCS State and the Authority; and
- being mindful in concluding the Agreement of the need for each Party to develop an administrative framework and procedures to facilitate the implementation of Article 82.

6.2 Operative clauses

I. Use of Terms and Scope

The Agreement will require an interpretation clause for (1) concepts and phrases considered or used as terms of art and (2) for the purpose of delimiting the scope of application of the instrument.

1) Interpretation

For example:

“Authority”: the International Seabed Authority.

“Contribution in kind”: meaning a percentage share of the produced resource in accordance with the scale of assessment in Article 82(2).


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32 The context for the purpose of interpretation of a treaty includes the preamble and annexes. VCLT 86, ibid., Art. 31(2).
“Outer continental shelf”: to refer to the seabed and subsoil of the submarine areas beyond the limits of the EEZ of the OCS State and up to the outer limit of the continental shelf as defined in accordance with Article 76 of the Convention. This definition needs to track the text of Article 76.

“Payments”: to refer to monies transferred to the Authority for the purposes of the discharge of the obligation.

“Production”: to refer to all production of the resource other than any test production and produced resources used in connection with exploitation. This definition has to take into consideration Article 82(2) which qualifies eligible production so as to focus on commercial production. It takes into consideration that “test production” is not “commercial production.” It also takes into consideration that a part of the resource, such as gas, may be re-injected into a well to enhance production. It is conceivable that “commercial production” might require further definition, possibly with reference to marketability of the produced resource or readiness for processing on a sustained basis.\(^{33}\)

“Resource(s)”: to refer to non-living resource(s) of the outer continental shelf.

“Site”: to refer to the geographical location of a resource. The definition should ensure that site means the delineated field of the discovered resource, thereby avoiding an interpretation of site that refers to each individual point of extraction, e.g., per well.

“Value”: to refer to the monetary value of the produced resource at the well-head in the case of hydrocarbons and extraction in the case of other non-living resources. The history of negotiations at UNCLOS III suggests that this was the meaning intended for value.

“Volume”: to refer to the gross production of the produced resource, but excluding test production and production of resources used in connection with exploitation. This definition would need to be consistent with the Article 82(2) reference to “all production”.

\(^{II.\text{ Convention Duties}}\)

2) **Duty of the OCS State**

The first substantive provision could reproduce the obligation of the OCS State in a manner that tracks the text of the LOS Convention, for example: “The [name of OCS State] shall make payments or contributions in kind in respect of the production from the exploitation of the non-living resources of the outer continental shelf pursuant to Article 82 of the Convention and in accordance with the procedure set out in this Agreement.”

\(^{33}\) In the oil and gas industry a “commercial field” is defined as “[A]n oil and/or gas field judged to be capable of producing enough net income to make it worth developing.” Oil & Gas UK, online: http://www.oilandgasuk.co.uk/glossary.cfm.
The provision should also state that the Authority is the institution responsible for receiving the payments and contributions and shall receive them in accordance with the procedure set out in this Agreement.

3) **Notice to be provided to the Authority regarding choice of making payments or contributions in kind**

The Convention provides the OCS State with the options of discharging the obligation by making payments or contributions in kind. The OCS State enjoys exclusive decision-making regarding the two options. In any case, the OCS State should give the Authority notice of its choice of option. The Agreement could address the choice in one of two ways.

- First, the notice of the option could be in the Agreement itself. This provides for simplicity and economy by focusing on one procedure for the discharge.

- Second, and in the alternative, the Agreement can include a provision that enables the OCS State to provide notice of the option at a later stage, but not later than by the end of the fifth year of production (i.e., end of the grace period). If this alternative is preferred the Agreement will need to include procedures for both payments and contributions as discussed below.

An interesting question is whether the Agreement should also provide for an OCS State to change the manner of discharge of the obligation and whether this should be anticipated in the text or can be left to future amendment of the Agreement. Ideally, and in the interests of simplicity, OCS States should be encouraged to commit to one option for the entire production life of a site.

**III. Provisions Common to both Payments and Contributions in Kind**

4) **Grace period**

Depending on date of commencement of the Agreement (i.e., whether on start of production at the beginning of Phase II or on termination of the grace period and commencement of Phase III; see “provision 21)” below), a provision regarding the grace period is desirable. The first five years of commercial production are established by the Convention as a period that is free of payments and contributions. The Agreement should address how this period is to be determined, including commencement and termination dates. If this is not determined in the Agreement, there will still need to be separate agreement between the OCS State and the Authority regarding the formal commencement of the sixth year of production.

Although the LOS Convention is silent on the possibility of suspension of the grace period, the very intention behind the grace period is to enable the OCS State (or developer) recover its development costs. Given that interruption of production will affect recovery of development
costs within the allocated time frame, it is reasonable to interpret the five year grace period not as a fixed period, but rather as “a time account” for the benefit of the OCS State. If this is a reasonable and practical interpretation, there should be provision for the OCS State to give notice of interruption to the Authority at the earliest practicable opportunity. The interruption must be such as to justify suspension of the grace period, followed by eventual notice of resumption of production and revival of the remaining grace period. The OCS State should provide the Authority with an explanation of the circumstances that give rise to interruption of production and failure to do so should not result in interruption of the grace period.

5) Notice of commencement of production to the Authority

Technical Study No. 4 noted that the OCS State should be expected to give notice to the Authority of the impending application of Article 82. This is not a stated requirement in Article 82 but can be characterised as an administrative matter related to the obligation to make payments or contributions. The OCS State is fully aware of the commencement date of commercial production and is therefore in a position to anticipate the date of commencement of the grace period (or Phase III). The notice should be at least 12 months before the obligation to make the first annual payment or contribution matures and will need to be a formal communication to the Authority.

The notice should contain technical information indicated or implied in Article 82 to enable full implementation of the provision, such as: identification of the producing site; official date of commencement of commercial production and consequent commencement of the grace period; type of non-living resource; value of production; volume of eligible production; etc.

6) Determination of amounts of payments and contributions in kind

The OCS State determines the amount of payments or contributions in kind due on an annual basis. The coastal State is best able to determine production amounts and consequently the determination of the amounts due is a logical corollary of that responsibility. The rates set out in the Convention should be re-stated in the Agreement (Table 3: Scale of Payments and Contributions).

The OCS State, through an authority designated by it in the Agreement, should certify that the amounts calculated, according to percentage of value in the case of payments and according to percentage of volume in the case of contributions in kind, to be correct and in compliance with Article 82(2).

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34 Technical Study No. 4, supra note 2, 51.
Table 3: Scale of Payments and Contributions

<table>
<thead>
<tr>
<th>Production year</th>
<th>Scale in terms of % of value or volume</th>
</tr>
</thead>
<tbody>
<tr>
<td>Years 1 to 5</td>
<td>0</td>
</tr>
<tr>
<td>Year 6</td>
<td>1</td>
</tr>
<tr>
<td>Year 7</td>
<td>2</td>
</tr>
<tr>
<td>Year 8</td>
<td>3</td>
</tr>
<tr>
<td>Year 9</td>
<td>4</td>
</tr>
<tr>
<td>Year 10</td>
<td>5</td>
</tr>
<tr>
<td>Year 11</td>
<td>6</td>
</tr>
<tr>
<td>Year 12 and subsequent years</td>
<td>7</td>
</tr>
</tbody>
</table>


Given that it is the responsibility of the Authority on behalf of all State Parties of the Convention to receive the amounts due, Technical Study No. 4 argued that it is reasonable for the Authority to expect information and explanations on how the amounts due are arrived at. Such explanations would add a measure of transparency to the discharge of the obligation. This should be reflected in the Agreement.

7) Calculation of amounts due

The basis for computing the amounts due is “all production.” This will need to be interpreted. One possible interpretation is “commercial production”, i.e., excluding test production, and that resources used in exploiting the resource are not to be included in the computation of production (e.g., natural gas re-injected to enhance recovery or to generate energy on board the installation, in the case of hydrocarbons). Flared gas may also have to be excluded as it is not produced for commercial purposes. Other expenses incurred in producing the amounts due may not be deducted because the purpose of the grace period is precisely to enable the OCS State (or developer) recover those costs.

It is reasonable to interpret the levy on “all production” as implying that no local taxes and charges be levied against the payments and contributions in kind, as these would have the effect of reducing the amounts imposed in the legal obligation.

Subject to Provision 11) below, it is conceivable the OCS State provides services not reasonably implied in Article 82 (e.g., lengthy storage and transportation of contributions in kind). If this is anticipated, the OCS State and the Authority should include express provision on how to cover the expenses of actual services rendered and with the prior consent of the Authority.
8) Scheme of payments and contributions in kind

Payments and contributions in kind are due on an annual basis. “Annual” will need to be defined by specifying actual date(s). By the end of a given production year the OCS State will have had to complete all payments/contributions due for that year. Specific dates would need to be set out. This will provide precision to the determination that a particular payment or contribution is in default or simply late.

There is nothing in Article 82 to prevent an interpretation that while discharging the obligation on an annual basis, the parties agree to a scheme of transfers spread throughout the year (e.g., quarterly, monthly or some other scheme). This could be a practical consideration where the OCS State opts to make contributions in kind. Multiple transfers in a given year would ostensibly be necessary to reduce storage costs.

A provision regarding “time is of the essence” is desirable to avoid delays.

IV. Provisions regarding payments

9) Making of payments

Technical Study No. 4 proposed that where the OCS State opts to make payments it should make them in an international or convertible currency. The most common practice is the use of a national currency that is convertible and in widespread use. This is normal in the determination of national assessed contributions for memberships in international organizations.\(^{35}\) An alternative but also common practice in international agreements is the utilisation of Special Drawing Rights (SDRs) as a neutral measure and convertible to different currencies.\(^{36}\) What is important is the receipt of payments in a currency that will enable the Authority to distribute them to other State Parties of the LOS Convention.

The Agreement should make provision for receipts to be issued by the Authority. By issuing receipts for amounts received, the Authority acknowledges sums received on account in discharge of the obligation. A useful addition could be for the Authority to issue an annual receipt and statement of accounts certifying amounts received in compliance with Article 82. In turn, the Authority would need to report compliance to its membership in its annual report on payments and contributions received.


The Agreement should anticipate the establishment of an account for each OCS State to enable payments to be made on account.

The OCS Agreement should specify the name of the contact institution in the OCS State that will be responsible for making payments and the counterpoint contact in the Authority. Detail with regard to the manner, procedure and bank account should be included, possibly in an annex.

V. Provisions regarding Contributions in Kind

While this Working Paper reiterates the recommendation in Technical Study No. 4 that OCS States consider discharging the obligation solely through payments, the exercise of the option to make payments or contributions is clearly a decision exclusive to the OCS State. Accordingly, the application of provisions on the making and administration of contributions in kind in this section depend on the option exercised.

10) Making of contributions in kind

The central provision will address how the OCS State will compute the amount of contribution in kind due as a percentage of the volume of eligible production. The basis of production will need to be stated. The percentage will need to be calculated on the volume of “all production” less the portion of the resource used in exploitation. No other deductions are permitted and nor may taxes and other charges be levied, as explained earlier.

As in the case of payments, the Agreement should make provision for receipts to be issued for contributions received on account by the Authority in discharge of the obligation. As mentioned elsewhere contributions can be expected to be received in allotments as the resource is produced, rather than in one annual allotment. Hence there will be a need for the Authority to issue an annual receipt and statement of account.

Again, as in the case of payments option, the OCS Agreement should specify the name of the contact institution in the OCS State that will be responsible for making contributions in kind and the counterpoint contact in the Authority or delegated institution. It is conceivable that the Authority may contract out the receiving of contributions in kind to a private commercial institution.

11) Delivery of contributions in kind

Where the OCS State opts to make contributions in kind the Agreement will need to anticipate times (including frequency), location(s) and manner in which the Authority is to take delivery of the amounts due. If the Authority takes delivery, it will need to be in a position to do so without delay.
The Convention is unclear as to where the contribution in kind is to be made, i.e., whether on site as produced or at the end of the transportation chain of the resource. The latter will likely involve costs for the OCS State.

A possible approach is for the OCS State and the Authority to agree that the OCS State would arrange for delivery as instructed by the Authority. Should this be considered part of the Article 82 obligation, or should it be considered a service over and above the OCS State’s and the costs of which ought to be covered from another source? The Workshop is invited to consider this question.

12) Marketing of contributions in kind

Instead of taking delivery, the OCS State and Authority might agree on marketing the contribution in kind on the open market with the assistance of the OCS State as soon as possible. A variation is to provide the OCS State with an option to buy the resource. The Agreement would need to include terms for this purpose, including any logistical matters (temporary storage, loading/unloading, chartering or transportation in another manner, e.g., pipeline in the case of gas) and provision to address charges for services rendered.

VI. Interruption or Suspension of Production

13) Notification of interruption or suspension of production

It is conceivable that there might be interruption of production for various reasons including operational decisions (for technical reasons), market conditions (decision taken in response to fluctuating supply, demand and price), bad weather, accidents and possibly force majeure. Under what circumstances, if at all, should the Authority be informed by the OCS State of interruptions to production? There is good reason to make such provision, in particular with regard to contributions in kind. The drop in production for the year would result in lower volumes of contributions in kind (and possibly also lower payments depending on market prices). The Authority might have made logistical arrangements that would need to be changed or cancelled.

14) Delay or interruption of payments or contributions in kind

It is conceivable that an OCS State might delay making payments or contributions. Technically, late payments and contributions can constitute breach of Article 82, which may be challenged by other State Parties, because they have to be made on an annual basis. In cases of delay there should be written notice provided to the Authority. A question to consider is whether a coastal State should pay interest on unjustified late payments and contributions, and if so, what procedure to use.
There could be interruption of production for a prolonged period beyond the control of the OCS State. As in the case of the grace period, there is no provision in the Convention to address this situation. In the event of an interruption that lasts several months and possibly a year, the resumed production could be captured by a higher percentage. This could potentially be perceived as an inequitable situation for the OCS State. One way of addressing it is similar to the earlier discussion regarding the grace period, i.e., consider the production year as a “time account” used for calculation of the applicable rate in a flexible manner. The alternative is to consider suspension of the operation of the Agreement, a situation anticipated by the VCLT 86. In either case, there will need to be provision for notice of delay.

In worst case scenarios, the interruption could be the result of necessity, accident and force majeure and it would be unfair to hold the OCS State to the Article 82 obligation without adjustment. It is conceivable that the OCS State is no longer able to perform the obligation, possibly subjecting the agreement to supervening impossibility of performance without the fault of the OCS State, a situation addressed by the VCLT 86. This situation is valid ground not only for suspension but also for premature termination of the Agreement. In all such cases, formal written notice from the OCS State to the Authority should be required as soon as possible.

VII. Monitoring and Confidentiality of Data and Information

15) Monitoring by the Authority

The provision of data and information by the OCS State to the Authority regarding the basis for the computation of amounts due has already been mentioned. This is in response to a reasonable expectation by the Authority, on behalf of State Parties to the LOS Convention, to ascertain that the amounts received reflect the scale of assessment set out in Article 82(2). There is support in the literature for a provision that would provide the Authority with a monitoring function for this purpose. One author is of the view that the Authority “would need to have a method of verifying production figures submitted to it.” The Workshop should consider how such function might be performed by the Authority or a designate.

16) Confidentiality of data and information

Technical Study No. 4 anticipated that in discharging its responsibilities under Article 82 the OCS State could provide the Authority with confidential or sensitive commercial information. That data could well be subject to ownership rights by operators in the OCS State. The Agreement proposes provisions with regard to explanations for determinations of amounts due by the OCS State and a monitoring function for the Authority. It is reasonable and good practice

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37 VCLT 86, supra note 11, Art. 57.
38 VCLT 86, ibid., Art. 67.
39 VCLT 86, ibid., Arts. 61-62.
for the Agreement to include an undertaking on the part of the Authority to maintain confidentiality of information received from the OCS State in discharging its responsibilities.

VIII. Interpretation and Dispute Settlement

17) Good faith

As noted earlier, the duty to perform agreements in good faith is a rule of general international law that is re-stated in the two Vienna Conventions. It is also captured by Article 300 of the LOS Convention and includes an accompanying obligation to exercise rights, jurisdiction and freedoms in a manner that does not constitute an abuse of right. Given the above, is there need for further express provision on good faith in the Model Article 82 Agreement? The argument for inclusion is to establish an express good faith duty for the Authority, which would otherwise be captured only by the VCLT 86 (which is not in force and to which the Authority is not a party) and general international law. The effect would be a more even-handed agreement between the OCS State and the Authority. The choice is between assuming the good faith duty as an implied term and including it as an express term.

18) Interpretation and application consistent with the Convention

A provision in the interpretation clause or later clause will need to situate any interpretative exercise of the Agreement within the framework and object of the LOS Convention. There are useful precedents to consider such as the Straddling Stocks Agreement. The text to include in the Agreement could be to the effect that nothing in the Agreement shall prejudice the rights, jurisdiction and duties of the OCS State and the Authority under the Convention and that the Agreement should be interpreted and applied in the context of and in a manner consistent with the Convention.

19) Applicable law

The Agreement will be governed by the LOS Convention and applicable principles of international law, presumably including principles of equity. The principles of the Vienna Conventions will govern interpretation issues against the back drop of the LOS Convention.

The parties may need to enter into subsidiary agreements as necessary to achieve the purposes of the Agreement. At least in the case of contributions in kind there may be need to enter into subsidiary or additional agreements of a commercial nature with the OCS State or designate, such as transportation (chartering and storage) and marketing of the resource in kind. These contractual arrangements will need to have choice of law and forum clauses.

41 Straddling Stocks Agreement, supra note 13, Art. 4.
20) Dispute settlement procedures

The discourse regarding the settlement of disputes between States and international organizations is complex.\(^42\) Differences or disputes could arise in the relationship between the OCS State and the Authority. These include differences over the interpretation and application of the Agreement, disagreements regarding the amounts paid against the scale in Article 82(2), unjustified late payments and contributions which entail expense for the Authority, differences over extent of the Authority’s mandate and so on.

The LOS Convention has made no express provision for the settlement of Article 82 disputes between an OCS State and the Authority. Technical Study No. 4 explained in depth the issues regarding Article 82 dispute settlement.\(^43\) Guidance in dealing with this difficult question in the Model Article 82 Agreement is to be found in part in the VCLT 86 and Annexes and in a constructive interpretation of particular provisions in the LOS Convention.

First, the Agreement should encourage the parties to resort to an exchange of views and negotiations to resolve differences. In the event of failure to resolve a difference within a specified timeframe, the Agreement could provide for a conciliation procedure between the parties. This procedure is advocated by the VCLT 86 with regard to disputes that do not involve the interpretation of *ius cogens*.\(^44\)

Second, Article 288 of the LOS Convention anticipates that a court or tribunal shall have jurisdiction over any dispute concerning “the interpretation and application of an international agreement related to the purposes of this Convention, submitted to it in accordance with the agreement.”\(^45\) A dispute settlement clause in the Agreement would have the effect of a State Party conferring jurisdiction on a court or tribunal. Insofar as the Authority is concerned, the Statute of the International Tribunal for the Law of the Sea (ITLOS) anticipates the possibility that States Parties to the LOS Convention and other entities may confer jurisdiction to it by agreement. It provides that the “Tribunal shall be open to entities other than State Parties … in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all parties to that case.”\(^46\) This is followed by another provision which provides the ITLOS with jurisdiction over “all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.”\(^47\) This is followed further by the following provision:

[If all the parties to a treaty or convention already in force and concerning the subject-matter covered by this Convention so agree, any disputes concerning the interpretation or application of


\(^{43}\) Technical Study No. 4, supra note 2, 64.

\(^{44}\) VCLT 86, supra note 11, Art. 66(4).

\(^{45}\) LOS Convention, supra note 1, Art. 288(2).

\(^{46}\) LOS Convention, ibid., Annex VI, Art. 20(2).

\(^{47}\) LOS Convention, ibid., Annex VI, Art. 21.
such treaty or convention may, in accordance with such agreement, be submitted to the Tribunal.\footnote{Los Convention, ibid., Annex VI, Art. 22.}

Technical Study No. 4 interpreted these provisions as enabling an OCS State and the Authority to confer jurisdiction on the ITLOS through a special agreement, or by extension through a provision in the Agreement. Once the ITLOS is seized of the case, the LOS Convention provides for the law to be applied by the Tribunal, namely the LOS Convention and other rules of international law not incompatible with the Convention, and further provides that if the parties so agree, the Tribunal may decide a case \textit{ex aequo et bono}.\footnote{Los Convention, ibid, Annex VI, Art. 23 and referentially Art. 293.}

In the event that the above provisions cannot be extended to cover an Article 82 dispute, the Assembly and Council of the Authority are empowered to seek an advisory opinion from the Seabed Disputes Chamber of ITLOS on legal questions arising within the scope of their activities,\footnote{Los Convention, ibid., Art 191.} which include the Authority’s powers with regard to Article 82. The Tribunal’s Rules of Procedure provide for advisory opinions referred to it by an international agreement, including a reference by whatever body is authorized by the agreement.\footnote{International Tribunal for the Law of the Sea, Rules of the Tribunal, Art. 138, online: http://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf.}

The contractual approach to implementation of Article 82 enables parties to also consider arbitration where conciliation does not resolve differences. The model 2010 Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), using the International Bureau of the Permanent Court of Arbitration as forum, would be useful to consider.\footnote{UNCITRAL, online: http://www.pca-cpa.org/showpage.asp?pag_id=1190.}

\section*{IX. Final Provisions}

The provisions in this section are standard clauses in treaties. The Workshop may wish to consider the extent to which, if at all, some of the proposed provisions need to be considered.

\subsection*{21) Duration of agreement}

There are two options regarding effective date and duration of the OCS Agreement both of which track the production life of the deposit, but to different extents.

The first option would see the effective date of the Agreement coinciding with the date of commencement of production in Phase 2 and would continue until the end of the production life of the resource. This option would include the grace period. A practical consideration for this is that Article 82 technically becomes effective on the date of commencement of commercial
production. The computation of the grace period and subsequent scale of payments are based on that date.

The second option would have an effective date coinciding with Phase 3, commencing at the start of the sixth year of production and continuing until the end of the production life of the resource. The consideration behind this option is that payments and contributions, which are due on an annual basis, become due only at the end of the sixth year of production, based on production that commences at the start of that year.

There are implications for the rest of the Agreement depending on choice of effective date. With the first option it is conceivable that the first five years of commercial production encounter interruptions which may lead to suspension of production. In that event, it is practical to make provision for possible suspension and eventual resumption of the grace period. The Authority will also need to have a mechanism or process in the Agreement to enable it to monitor the production during the grace period.

22) Amendments

The Agreement should be expected to last as long as commercial production from a site continues. This could be a very long period, perhaps in the order of decades. Unexpected events may arise over the life of the site that might require adjustments to be made to how the relationship between the OCS State and the Authority should be administered. It is advisable to build a capacity to amend the Agreement to address unanticipated matters or simply to ensure that the Agreement remains relevant. Clearly, amendments must continue to be guided by the requirement to ensure consistency with the LOS Convention.

23) Signature and entry into force

As other bilateral agreements, the Agreement will have provision for signature and entry into force.

A further consideration is whether the Agreement would benefit from a provision regarding ratification (in the case of the OCS State) where a domestic constitutional requirement so dictates and a consequent act of affirmation (in the case of the Authority). One argument could be that the Agreement does not impose any new international obligations on the OCS State, so that it is effectively a simple executive agreement intended to give effect to an existing conventional obligation. The matter is arguable with regard to the Authority. It may be argued in the latter’s regard that as an international organization with full legal personality it is already mandated by its own constitutive instrument to enter into such international agreements and therefore needs no further affirmation. It is also true that the Authority’s agreements with contractors with regard to activities in the Area are simply executive agreements that do not require any further act of affirmation. The Agreement could be regarded as another executive agreement. This is a matter for the Workshop to consider.
24) Denunciation

Denunciation is a common term in treaties. It is expressly dealt with in the two Vienna Conventions. It is conceivable there is no need for such provision in the Agreement as the general international law rules regarding denunciation would apply. However, the Agreement is a somewhat different instrument from other bilateral treaties, in the sense that it does not cover new subject-matter and as described earlier, it could be regarded as a form of executive agreement to facilitate the implementation of an existing conventional obligation. Where an OCS State denounces the Agreement, the effect can only be limited to the administrative relationship contemplated in the Agreement to enable implementation of the conventional obligation, but not the conventional obligation itself. For that purpose and greater certainty, it might be useful to include a denunciation clause.\(^{53}\)

25) Termination

The Model Article 82 Agreement should anticipate how the Agreement may be terminated. A clause on termination should be included.\(^{54}\) The Agreement could be terminated for several reasons, including: denunciation; end of the production life of a site, either because the resource is depleted or because it is no longer commercially feasible to continue to produce; prolonged interruption and suspension of production; etc. It is important to anticipate orderly termination of the administrative relationship between the OCS State and the Authority and enable both to complete internal procedures to bring closure. There will need to be notice of termination which should be given at least a year in advance of the effective date of termination (consistently with the duty to make annual payments).

26) Depositary

The designation of depositary is normally important for multilateral instruments rather than for bilateral agreements. However the OCS Agreement is a unique agreement which includes the Authority as a party and acting on behalf of other States Parties to the LOS Convention. The Authority is effectively an \textit{ad hoc} depositary for such agreements.\(^{55}\) If the Workshop considers it useful to consider a depositary function for the Authority, the Authority would have a duty to act impartially.\(^{56}\)

27) Registration and publication

As mentioned earlier, the Agreement is essentially a treaty, albeit between a State and an international organization, and a public document. It should be registered and published with the

\(^{53}\) VCLT 86, supra note 11, Art. 43.
\(^{54}\) VCLT 86, ibid., Art. 54.
\(^{55}\) VCLT 86, ibid., Art. 77.
\(^{56}\) VCLT 86, ibid., Art. 78.
UN Secretariat. Another reason is that a considerable number of Member States of the United Nations are not parties to the LOS Convention and members of the Authority.

7. CONCLUSION

It is clear that Article 82 of the LOS Convention has textual ambiguities and process gaps that can be expected to constrain implementation. This paper has been prepared to stimulate discussion on how best to address issues. These include the following:

1) This Working Paper distinguishes between issues of interpretation that are essentially administrative and others that may be characterised as substantive in nature.
   a. Are there any substantive issues of interpretation in Article 82 that would require clarification by States Parties to the LOS Convention (SPLOS) prior to its implementation and if there are, what are they?
   b. If so, in what form (e.g., a resolution of State Parties or more formal agreement)?

2) The Working Paper characterises the relationship between OCS States and the Authority embedded in Article 82 as essentially an administrative one.
   a. Does the Workshop consider the proposed Model Article 82 Agreement to be a useful implementation tool?
   b. What further work does the Workshop recommend be undertaken to further develop the Model Article 82 Agreement?

3) At the Chatham House Workshop participants felt that OCS States should be invited to consider performing their obligation in Article 82 solely through the payment method. The reasons are various: the Authority is not equipped to receive contributions in kind; payments are simpler to administer; implementation/administration costs would be kept to a minimum for both the Authority and OCS State.
   a. Should this idea be pursued further, even though the OCS States have the right to opt for payments or contributions in kind?
   b. If so, should the idea be proposed to SPLOS or simply be discussed with individual OCS State with regard to the content of the Model Article 82 Agreement?

4) In the event the OCS State opts to make contributions in kind it is unclear how the obligation is to be discharged and where and how the Authority should be expected to take delivery of the share of the resource contributed.

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57 VCLT 86, ibid., Art. 81.
a. Is there an expectation that the OCS State will deliver the contribution in kind to a place and time designated by the Authority?

b. Should the costs incurred by the OCS State in delivering the contribution be incurred by the OCS State or should they be covered in some other manner? If the latter, how?

5) Article 82 does not expressly provide the Authority with an overseeing role insofar as the performance of the obligation by the OCS State is concerned. However, it may be implied that the Authority must exercise an administrative monitoring function on behalf of States Parties to enable it to receive payments and contributions in compliance with Article 82(2) and distribute these to other State Parties.

   a. What information should the Authority reasonably expect from OCS States given its responsibilities on behalf of States Parties in Article 82?
   b. What should such a monitoring function be and to what extent?
   c. How would the Authority perform such function?

6) The Chatham House Meeting noted that the LOS Convention has not anticipated how disputes regarding the interpretation and application of Article 82 should be resolved. It is conceivable that there could be disputes between States Parties themselves, but these are captured by Article 270 and subsequent provisions. Disputes between an OCS State and the Authority with regard to matters that do not relate to activities in the Area are not expressly captured.

   a. Where an Agreement is entered into and in the event of a dispute between an OCS State and the Authority: in addition to resort to negotiations and possibly conciliation, should there be further resort to advisory opinion (including “binding advisory opinion”) of the ITLOS or other third party settlement such as arbitration? If so, is there preference for a third party resolution mode?
   b. Where there is no Agreement between an OCS State and the Authority: what dispute resolution option(s) applies or should apply? Would advisory jurisdiction by means of an ad hoc agreement between an OCS State and the Authority conferring jurisdiction on ITLOS for this purpose be sufficient? If the OCS State does not express consent, what other procedure could the Authority explore?

As a final concluding comment, it can be expected that the Authority will incur expenses in the administration of Article 82. Although this is not an issue for the Model Article 82 Agreement per se, it is an important consideration in considering how the Authority will discharge its administrative responsibilities in the implementation of this provision. Can the Authority charge its overhead costs to the payments and contributions in kind received from OCS States and before distributing benefits? This is a matter for the Workshop to consider.
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(2) **Secondary materials**


(3) **Websites**


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Oil & Gas UK, online: http://www.oilandgasuk.co.uk/.


# ANNEX

Framework for an Agreement between an OCS State and the International Seabed Authority on the Implementation of Article 82

<table>
<thead>
<tr>
<th>Part</th>
<th>Provision</th>
<th>Title</th>
<th>Purpose and possible content</th>
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<tr>
<td>Preamble</td>
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<td>Recalling the context and purpose of the LOS Convention; Noting the existence and purpose of Article 82; Noting further that the OCS State and the Authority are assigned responsibilities for the purposes of the provision; Recognizing that the provision does not set out administrative procedures for the discharge of the responsibilities of the OCS State and the Authority; and Being mindful in concluding the Agreement of the need to develop an administrative framework and procedures to facilitate the implementation of Article 82. Hereby agree as follows:</td>
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<tr>
<td>I. Use of terms and scope</td>
<td>1</td>
<td>Interpretation</td>
<td>“Authority”: the International Seabed Authority. “Contribution in kind”: meaning a percentage share of the produced resource in accordance with the scale of assessment in Article 82(2). “Convention”: the United Nations Convention on the Law of the Sea, 1982. “Outer continental shelf”: to refer to the seabed and subsoil of the submarine areas beyond the limits of the EEZ of the OCS State and up to the outer limit of the continental shelf as defined in accordance with Article 76 of the Convention. This definition needs to track the text of Article 76. “Payments”: to refer to monies transferred to the Authority for the purposes of the discharge of the obligation. “Production”: to refer to all production of the resource other than any test production and produced resources used in connection with exploitation. This definition has to take into consideration Article 82(2) which qualifies eligible production so as to focus on commercial production. It takes into consideration that “test production” is not “commercial production.” It also takes into consideration that a part of the resource, such as gas, may be re-injected into a well to enhance production. It is conceivable that “commercial production” might require further definition, possibly with reference to marketability of the produced resource or readiness for processing on a sustained basis.</td>
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</table>
“Resource(s)”: to refer to non-living resource(s) of the outer continental shelf.

“Site”: to refer to the geographical location of a resource. The definition should ensure that site means the delineated field of the discovered resource, thereby avoiding an interpretation of site that refers to each individual point of extraction, e.g., per well.

“Value”: to refer to the monetary value of the produced resource at the well-head in the case of hydrocarbons and extraction in the case of other non-living resources. The history of negotiations at UNCLOS III suggests that this was the meaning intended for value.

“Volume”: to refer to the gross production of the produced resource, but excluding test production and production of resources used in connection with exploitation. This definition would need to be consistent with the Article 82(2) reference to “all production”.

| II. Convention Duties | 2 | Duties of OCS State and the Authority | The OCS State shall make payments or contributions in kind in respect of the production from the exploitation of the non-living resources of the outer continental shelf pursuant to Article 82 of the Convention and in accordance with the procedure set out in this Agreement.

The Authority will receive payments and contributions in kind in accordance with this agreement. |

| 3 | Notice to be provided to the Authority regarding choice of payments or contributions in kind | The OCS State shall notify the Authority in writing regarding choice of between making payments or contributions. Two alternative approaches:

(a) The Agreement could provide notice or contain provision regarding the giving of notice by a specified date; or

(b) The Agreement may or may not provide for a change of option after first notice is received by the Authority. |

| III. Provisions Common to both Payments and Contributions in Kind | 4 | Grace period | The inclusion of a provision on the grace period depends on date of commencement of the Agreement.

The grace period is the first five years of production and is free of payments and contributions.

Provision for determination of the grace period, i.e., date of commencement.

Possible provision regarding potential suspension of grace period for good cause, to be given as soon as is practicable. |

| 5 | Notice of commencement | The OCS State shall provide the Authority with written notice of expected commencement of production related to |
of production to the Authority | the obligation to make payments or contributions, at least a year before the obligation matures.

The notice should contain technical information, such as:
identification of the producing site; official date of commencement of commercial production and consequent commencement of the grace period; type of non-living resource; value of production; volume of eligible production.

| 6 | Determination of amounts of payments and contributions in kind | Statement of scale set out in Article 82(2) based on years of production:
Years 1-5: no payments or contributions
Year 6: 1%
Year 7: 2%
Year 8: 3%
Year 9: 4%
Year 10: 5%
Year 11: 6%
Year 12: 7%

The OCS State certifies that calculations are in compliance with Article 82, and identifies certifying authority.

OCS State provides Authority with information and explanations on how the amounts due are calculated.

| 7 | Calculation of amounts | The basis for calculating amounts due shall be “all production”.

The portion of the resource used in connection with exploitation shall not be included in the calculation.

No local taxes and charges shall be levied against the payments and contributions in kind.

Provision regarding costs to cover actual services rendered apart from the obligation to make payments or contributions and with the prior consent of the Authority.

| 8 | Scheme of Payments and Contributions in Kind | Definition of “annual” for payment cycle purposes.

Provision for potential scheme of periodic payments or contributions in kind over the course of the year.

Time is of the essence.

| IV. Provisions regarding Payments | Making of payments | The OCS State shall designate an authorised institution for the making of payments.

The Authority shall designate an authorised office to receive payments.

Payments to be made in a designated currency. |
| V. Provisions regarding Contributions in Kind | 10 | Making of contributions in kind | The OCS State shall designate an authorised institution for the making of contributions in kind.  
The Authority shall designate an authorised office to receive payments.  
Provision regarding how the OCS State will compute the amount of contribution in kind due as a percentage of the volume of eligible production: basis of production; percentage calculated on volume of eligible production.  
Manner of making of contributions in kind to be set out.  
Possible provision regarding scheme for making of contributions in kind.  
The Authority shall issue receipts for contributions received.  
The Authority shall issue an annual receipt and statement of account. |
| --- | --- | --- | --- |
| 11 | Delivery of contributions in kind | Provision regarding how the Authority is to take delivery without delay (anticipating arrangements regarding time, location, etc.).  
Authority may instruct delivery to a particular location against costs of delivery. Provision for how costs are to be recovered by the OCS State. |
| 12 | Marketing of contributions in kind | Provision for possible marketing of contributions in kind, including buy-back option for the OCS State.  
Provision regarding logistical arrangements and services for fees provided by the OCS State, including pending marketing. |
| VI. Interruption or Suspension of Production | 13 | Notification or interruption or suspension of production | OCS State to provide notice in writing to the Authority in cases of interruption or suspension of production, including reasons, as soon as practicable. |
| 14 | Delay or interruption of payments or contributions in kind | OCS State to provide notice in writing to the Authority in cases of interruption or suspension of payments or contributions in kind, including reasons, as soon as possible.  
OCS and Authority to enter into discussions concerning delay or interruption. |
**Effect of unjustified delay in making payments and contributions.**

Justified delay (specify what constitutes justified delay, e.g., force majeure interrupting production) and effect of interruption on the applicable rate of payment or contribution.

Prolonged delay leading to suspension of agreement (see below).

<table>
<thead>
<tr>
<th>VII. Monitoring and Confidentiality of Data and Information</th>
<th>Monitoring by the Authority</th>
<th>The Authority has a duty to monitor payments and contributions. Need for a provision on how the scope and exercise of this function.</th>
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<tr>
<td>15</td>
<td>Confidentiality of data and information</td>
<td>The Authority will need to provide an undertaking to maintain confidentiality of data and information received by the OCS State.</td>
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<tr>
<th>VIII. Interpretation and dispute settlement</th>
<th>Good faith</th>
<th>Possible provision on good faith in the interpretation and application of the Agreement.</th>
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<tbody>
<tr>
<td>17</td>
<td>Interpretation and application consistent with the LOS Convention</td>
<td>Nothing in the Agreement shall prejudice the rights, jurisdiction and duties of the OCS State and the Authority under the Convention and that the OCS Agreement should be interpreted and applied in the context of and in a manner consistent with the Convention.</td>
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<tr>
<td>18</td>
<td>Applicable law</td>
<td>The Agreement will be governed by the LOS Convention and applicable principles of international law. Parties may enter into subsidiary agreements as necessary to achieve the purposes of the Agreement. Where subsidiary agreements are entered into, they continue to be governed by the main agreement.</td>
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<tr>
<th>IX. Final provisions</th>
<th>Dispute settlement procedures</th>
<th>Possible three-tiered approach:</th>
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<td>20</td>
<td></td>
<td>Tier 1: In case of differences, the parties should resort to exchange views and negotiation to resolve the matter within a reasonable timeframe.</td>
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<td>Tier 2: Failing resolution by negotiation, the parties could resort to conciliation (possibly each appointing a conciliator and a third appointed by the other two).</td>
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<td>Tier 3: Conferment of full jurisdiction to the ITLOS; or for resort to an advisory opinion of ITLOS; or arbitration using the 2010 UNCITRAL Arbitration Rules with the International Bureau of the Permanent Court of Arbitration as forum.</td>
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<th>IX. Final provisions</th>
<th>Duration of agreement</th>
<th>Two options:</th>
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<td>21</td>
<td></td>
<td>(a) Effective date coinciding with the date of commencement of production in Phase 2 and until the end</td>
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of the production life of the resource.

(b) Effective date coinciding with Phase 3, commencing at the start of the sixth year of production and continuing until the of the production life of the resource. There are implications for the rest of the Agreement depending on choice of effective date.

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<tr>
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<th>Amendments</th>
<th>Amendment on the basis of mutual agreement, with a process to commence with provision of notice by either party.</th>
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<td>22</td>
<td>Signature and entry into force</td>
<td>The Agreement will have provision for signature and entry into force.</td>
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<tr>
<td>23</td>
<td>Denunciation</td>
<td>Either party may denounce the Agreement. Denunciation does not affect either party’s rights and responsibilities under the LOS Convention.</td>
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<tr>
<td>24</td>
<td>Termination</td>
<td>Termination as a result of expiry. Provision of a year’s written notice of termination if Agreement is to be terminated for some other reason.</td>
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<tr>
<td>25</td>
<td>Depositary</td>
<td>Authority to have depositary functions?</td>
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<tr>
<td>26</td>
<td>Registration and publication</td>
<td>Agreement to be registered with the UN Secretariat?</td>
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