The Revenue Sharing Scheme with Respect to the Exploitation of the Outer Continental Shelf under Article 82 of the United Nations Convention on the Law of the Sea —A Plethora of Entangling Issues—

Seminar on the Establishment of the Outer Limits of the Continental Shelf beyond 200 Nautical Miles under UNCLOS—Its Implications for International Law—
Organized by the Ocean Policy Research Foundation

Text of a Presentation

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27 February, 2008
The Nippon Foundation Building

Thank you so much Mr. Chairman, Professor Kuribayashi. Good afternoon distinguished guest and Ladies and Gentlemen. I am really pleased to be here with you all. I thank the Nippon Foundation and the Ocean Policy Research Foundation for giving me such an honorable opportunity to make a presentation in this Seminar.

1. Introduction
Questions as to the Meaning of "a Compromise" Reflected in the Revenue Sharing Scheme under Article 82 of the United Nations Convention on the Law of the Sea

My presentation will address the revenue sharing scheme under Article 82 of the United Nations Convention on the Law of the Sea (UNCLOS). As seen in the brochure in your hand Article 82 is included in the conference documents. Please refer to it when you need.

According to the Article, coastal States should make the payments or contributions from profits that are gained by exploitation of resources on their outer continental shelves. This revenue sharing scheme is applied to the exploitation of resources on the continental shelf only beyond 200 nautical miles. Article 82 and Article

76 of UNCLOS were adopted in a package-deal in the drafting process. This fact eloquently tells that the establishment of the outer continental shelf regime and that of the revenue sharing scheme are in a *quid pro quo* relationship to each other. In other words, the outer continental shelf regime could be established solely because the revenue sharing scheme was adopted at the same time.

Considering such background, the issue of the legal status of the outer continental shelf and that of the revenue sharing under Article 82 could not be examined separately. In the previous Presentation given by Prof. Alex Oude Elferink, who has been my long time good friend, the legal status of the outer continental shelf, and the question as to whether Article 76 has been recognized as customary international law were already analyzed. In that context the revenue sharing scheme was also touched upon, since it has substantial significance in that examination.

Based upon the Alex's interesting presentation, before moving into the main body of my presentation, first, as an Introduction**,** I would like to raise a question as to in what sense precisely the outer continental shelf regime and the revenue sharing scheme are intertwined with each other. It is a fact there was some compromise for the adoption of Article 82 between the two conflicting camps.

As to the outer continental shelf regime, one camp objected to it. Although the interests of the States belonging to this camp did not make a complete unison, they almost commonly criticized it by appealing for the concept of "the common heritage of mankind" reflected in the deep sea bed regime.

The other camp that promoted the establishment of the legal regime of the outer continental shelf wanted to enlarge their continental shelves. In order to support their claims, they concertedly emphasized the principle that the continental shelf forms the natural prolongation from their landmass, and that by virtue of their sovereignty over the land, coastal States have inherent and sovereign rights over their continental shelves *ipso facto* and *ab initio*. This is the famous phrase declared by the International Court of Justice (ICJ) in the judgment of the North Sea Continental Shelf Case in 1969.

In fact, what compromise was realized between these camps in drafting Article 82? What are the gains and loss of each camp?

There is a well and always spoken story about these questions. It is as follows. Beyond the continental shelf, and beyond sea bed areas where national jurisdiction covers, there are deep sea bed areas. Common heritage of mankind is the very key concept for the legal regime of deep sea beds. The extension of the sovereign rights of coastal States of continental shelves may mean serious encroachment, at least quantitatively, or in terms of space, upon deep see bed areas. Therefore, beyond 200 nautical miles from coasts, coastal States of continental shelves should make the payment or contributions from profits gained by exploitation of non-living resources of outer continental shelves.

This story tells that the revenue sharing scheme is the very compromise between the conflicting legal concepts of the two regimes. Is it really so? Several simple questions come to my mind. Does it provide a substantive balance between the conflicting camps in Article 82 as it is before us? Does it provide helpful guidelines for interpretation of Article 82? Does the International Sea Bed Authority fulfill some rolls to realize this compromise? Why, only beyond 200 nautical miles the continental shelf regime should be restricted in order to maintain the object and purpose of the common heritage of mankind? Why are only non living resources subject to the revenue sharing scheme?

In the Second Part my presentation begins with an examination as to how and what actually the compromise is. Drafting process of Article 82 and its result will be surveyed from this perspective. I will mainly deal with the two following points: first, the function of the International Sea Bed Authority (ISA), and, second, the discretion of coastal States of outer continental shelves that is allowed concerning the obligation of making the payments or contributions.

The Third Part of my presentation will succinctly provide a general overview of the revenue sharing scheme under Article 82. For that purpose, I will try to confirm the meaning and interpretation of several key terms contained in Article 82. Because of the package-deal in the drafting process and due to the priority given to achieving consensus, the conflicting camps only narrowly reached the compromise by sacrificing clear and concrete meaning of Article 82.

Lastly the Fourth Part of my presentation will address “possible disputes” concerning the interpretation and application of Article 82. If I could use the term “disputes”, I would lodge some questions as to who can be the parties in a rivalry

position regarding the revenue sharing scheme and what may be the possible dispute settlement procedures to treat them.

Now, I am moving onto the Second Part of my presentation.

2. The Nature of the Compromise Actually Reached under Article 82

(1) The Powers and Functions of the ISA

In order to understand the compromise reached within the framework of Article 82 it is significant to trace the treatment of the ISA in the drafting process of the Article. If the ISA is given some powers and functions, the fact mirrors legal restriction on the side of the sovereign right of coastal States over their outer continental shelves.

Under Article 82 the ISA is the organ "through which" the payments or contributions are made and it has the power to distribute them to State Parties on the basis of equitable sharing criteria and taking into account the factors indicated by the Article. From a perspective of rivalry relation between the outer continental shelf regime and the deep see bed regime, my attention principally goes to the powers and functions of the ISA solely in relation to coastal States of outer continental shelves that owe the obligation of making the payments or contributions. For this reason, the distribution of payments or contribution to State Parties is out of my focus.

Concerning the status of the ISA the assumed power of it was refused in drafting process to a significant degree.

First, there was following important changes in the drafting process. In place of the expression of "the payments or contributions shall be made **TO** the ISA", that of "payments or contributions shall be made "**THRGOUH** the ISA" was finally adopted. In addition, and more substantially, there was a proposal for establishing the Fund of Common Heritage of Mankind, but it could not gain much support from the States.

In this regard, under Article 171 for the financial arrangement the ISA has funds and it can operate and utilize them in accordance with the relevant provisions of UNCLOS. Comparatively, under Article 82 the payments or contributions that are not made "TO" the ISA but solely "THRGOUH" the ISA do not mean in any sense the funds of the ISA.

Second, concerning several aspects of the process through which the payments or contributions are made, some functions and powers of the ISA were proposed in various drafting proposals. However, almost all of them were actually abortive. For instance, making agreements between the ISA and coastal States was assumed regarding the following issues, such as, determination of “revenue” which means difference between value of resources and cost of production, and terms and procedures for each payment or contribution. Such a status of a party to those agreements was not finally given to the ISA. Rather, it was also proposed that the State Parties to UNCLOS, without involving the ISA, should make agreements on those matters. As is seen under Article 82 Paragraph 2, the provision itself prescribes terms and conditions for the payments or contributions. A proposal for the power of the ISA to determine if and to what extent developing countries shall be obliged to make payments or contributions was not accepted.

Furthermore, the following facts are not only critical but also really symbolic of the general attitude and the general atmosphere of participating States to the drafting process. A provision dealing with a power of the ISA to take appropriate measures in order to ensure the payments or contributions was not realized. Dispute settlement procedures for the disputes concerning the payments or contributions between the ISA and coastal States do not appear in the final draft of Article 82, either. Thus, the ISA under Article 82 has neither a function to ensure the payments or contributions nor a status of a party to such a dispute. These facts really reveal substantive lack of power for the ISA to be representing the State Parties to UNCLOS in order to ensure the payments or contributions and to maintain the object and purpose of the idea of common heritage of mankind as being opposed to the enlargement of the sovereign rights of coastal State of continental shelves.

Judging from the examination of the drafting process and Article 82 as it is before us, I can find that the ISA actually does not regulate nor control the revenue sharing scheme in order to reflect the idea of the common heritage of mankind. Over sea bed areas beyond 200 nautical miles from coasts certainly a compromise was required between the two conflicting regimes of the outer continental shelf and the deep sea bed. The point is, however, the ISA does not have the necessary power for that purpose. Rather, such proposals did not acquire support needed to appear in Article 82.

The well spoken story which I mentioned before explains that Article 82 is the

compromise of the conflict between these two opposing camps. Such an overview may give only a rough grasp about the conflict paradigm of the interested States. As a matter of fact, looking into the Article in depth, the compromise does not realize such substantive consequences as being expected in the term of a compromise.

Then, in what precise sense, does Article 82 mean a compromise between the two regimes for sea bed areas? If only making the payments or contributions according to the Article is the compromise, and if coastal States have broad discretion with this, does it remain just a political compromise without further legal implication or limitation on the side of coastal States of outer continental shelves? Or, do the terms and phrases of Article 82 properly restrict the discretion of coastal States? This is my next question.

(2) The discretion of coastal States concerning the payments or contributions

In comparison with the lack of powers and functions on the side of the ISA, coastal States of outer continental shelves have wide discretion regarding the payments or contributions in several aspects.

First, they can decide by themselves whether they make the payments or contributions.

Second, if and when the obligation to make the payments or contributions is provided for by Paragraph 2 of Article 82. In drafting process, some intervention by the ISA or making agreements between it and coastal States was proposed, but such proposals did not acquire support. In place of it, Article 82, Paragraph 2 itself designates the terms and conditions for the payments or the contributions. Accordingly coastal States may decide by themselves if and when the obligation is triggered. In making that decision, they have allowance unless their decisions do not significantly step out of the margin of an arguable interpretation of Paragraph 2 of Article 82.

Third, according to Paragraph 3 of Article 82 if a coastal State is a net importer of mineral resources, it is exempt from the payments or contributions. In the drafting process, there was a proposal that the ISA shall determine if and to what extent developing countries shall be obliged to make the payments or contributions, but, again such a proposal was abortive. Hence, a coastal State may enjoy the exemption by claiming such a beneficial status. How the exemption is tolerant is dependent upon the interpretation of the Paragraph.

As examined here, coastal States have discretion generally with the payments or contribution and the exemption from it. To what extent the payments or contributions are effectively exercised, and to what extent coastal States have a wide discretion in deciding these issues depend upon the allowable interpretation of Article 82, which I will deal with in the Third Part of my presentation.

(3) Tentative conclusions for the Second Part

Before moving into the Third Part of my Presentation, for the Second Part, I might draw some tentative conclusions.

The obligation of making the payments or contributions itself is really a result of a compromise between the two conflicting camps regarding the establishment of the outer continental shelf regime. That is true. This compromise, however, has at the most a political nature, and it does not establish a substantive balance of interests between the two legal regimes of the outer continental shelf and the deep sea bed. In this regard, I have already made clear the following two points. First, within the revenue sharing scheme under Article 82, the ISA lacks necessary powers to regulate and control it for the purpose of maintaining the idea of the common heritage of mankind. Second, costal States of outer continental shelves may have wide discretion concerning the making of the payments or contributions.

Furthermore, I can add that the legal nature of the payments or contributions is not legally explicable.

The well spoken story explains that widening outer continental shelves is encroaching upon the deep sea bed areas, and, therefore, coastal Sates should make the payments or contributions as if it were a sort of compensation for the loss of interests which could be realized by the exploitation of resources in accordance with the deep sea bed regime. Looking into the drafting process from this viewpoint, it was proposed that profits gained from the exploitation of resources of a continental shelf even within 200 nautical miles should be also subject to the revenue sharing scheme. The result was, however, that only to the outer continental shelf the revenue sharing scheme is applied. Considering this, the delimiting line of 200 nautical miles does not hold convincingness or meaningful reasons for the purpose of determining the sea bed areas where the revenue sharing scheme is applied. Unless the standard of 200 nautical miles sets forth

an objective reason for the limit of full national jurisdictional areas that are without the obligation of the revenue sharing, it cannot be a theoretical conclusion that solely beyond 200 nautical miles, in terms of space and quantity the outer continental shelf regime is encroaching upon the deep sea bed regime.

Accordingly, Article 82 does not in a substantive sense accomplish a compromise between the two regimes. Without objective reasoning, without conferring on the ISA the presumed powers, it establishes the revenue sharing scheme for only the outer continental shelf regime. It is doubtful whether I could depend on it as being a reference framework generally recognized by States, in deriving conclusions for interpretative issues of Article 82.

On the basis of this understanding, in the Third Part of my presentation, I will deal with several interpretative issues of Article 82.

3. Some Interpretative Issues of Article 82

(1) If and when does the obligation of making the payments or contributions occur?

Paragraph 1 of Article 82 prescribes the obligation of the payments or contributions, and the following Paragraph 2 of Article 82 provides for if and when the obligation occurs. Also Paragraph 3 determines the condition on which developing States may be exempt from the obligation. From the perspective of how and to what extent coastal States' discretion is limited or broadened, here, Paragraphs 1 and 2 of Article 82 will be focused upon.

Another concern of mine is whether the compromise reflected in the Article takes into consideration practical factors, such as motivation and situations of mining industries. Even if the compromise holds a political nature and does not establish substantive balance between the conflicting positions, it might set forth guidelines backed up by those practical considerations. Such a viewpoint has much significance in terms of domestic implementation of the revenue sharing scheme.

(2) Critical terms and phrases in Paragraph 2 of Article 82

Let's look at Paragraph 2 of Article 82. Several terms and phrases of the provision may provoke interpretative issues.

Under UNCLOS it is a State to owe the obligation of making the payments or

contributions, and generally international law does not intervene in the domestic issues as to how the States domestically implement the obligation, for instance, by passing over the burden to their national industries.

As a matter of fact, it is very likely that coastal States will institute license system for the exploitation of the resources on their outer continental shelves. It is also likely that they require royalties from their mining industries in order to allot for the payments or contributions under Article 82. The following examination is based upon on this general assumption, in appropriate cases.

First**,** as mentioned before, a coastal State may decide whether they comply with the obligation by making the payments or contributions. If they choose making contributions, how will it be realized? How will it transport to the ISA? Should the coastal State pay the transportation cost? Where is the destination of the contributions? Does the ISA have depots for that purpose? No guidance may be derived from Paragraph 1 of Article 82 and other provisions concerning the ISA under UNCLOS.

Second**,** the obligation of making the payments or contributions occurs "after the first five years of production." Let's take an example of oil mining industries. The **"**production**"** is interpreted as "the first oil production." As another interpretation, it may also be "the first commercially produced oil." The latter interpretation should not be totally excluded, since concerning the term "production", Paragraph 2 of Article 82 only says that "Production does not include resource used in connection with exploitation." The coverage of the terms "resource used in connection with exploitation" is, in its turn, also flexible and allows differences of opinion as to its interpretation.

Third**,** a five-year grace period is given before the commencement of making the payments or contributions. It is not easy to find persuasive explanation for the five-year period from an industrial or practical perspective. It may depend upon various factors whether or not five years are enough for the relevant industries to grow the exploitation profits and to recover its cost.

"The value or volume" of production at site means gross value not net value. A proposal for net value was not adopted in the drafting process. This means that until the commencement of the payments or contributions, the five-year grace period is allowed, but once the making of the payments or contributions begins, it shall be on the gross

value basis, and so the exploitation cost cannot be considered.

Fourth**,** not only the five-year grace period but also the "from one per cent to seven per cent" of the payments or contributions was not accompanied with practical explanation. No enough reasons could be found why "from one per cent to seven per cent" is the most appropriate in order to incorporate the idea of the common heritage of mankind into the legal regime of the outer continental shelf.

(3) Factors to be considered in the domestic implementation of the revenue sharing scheme

Coastal States backed up with industries' needs naturally tend to interpret Article 82 as easier as possible for them to comply with. Here it is critical whether the terms and conditions of the obligation of the revenue sharing are actually based upon the reality of mining industries and others.

The industries should absorb the extra cost, for instance, in paying the royalties in order for getting licenses from their national States. Whether or not the situation of industries is ready for absorbing the extra cost is various and depending on kind of resources they are dealing, demand for the resources, the expense of extraction, potential profit margins and etc. The more divergent the terms and conditions of the obligation under Article 82 is from the reality of the relevant industries, the more coastal States are likely to interpret the obligation for their favor by making use of their discretion.

(4) Expectation for the payments or contributions according to the revenue sharing scheme under Article 82 in comparison with prospected interests from exploitation of deep sea beds

Looking from a different perspective, it is prospected that the international society's first source of revenue from resources on sea beds will the payments or contributions to be made in accordance with Article 82. Thus, significant expectation is placed upon the revenue sharing scheme. The reason for it is that the prospect for deep sea bed mining still remains highly uncertain. In addition, science says that on sea bed areas relatively close to 200 nautical mile line from coasts there exist rich natural resources. If the exploitation project under the deep sea bed regime is not properly making progress, the same sea bed areas may likely be incorporated into outer continental shelves of coastal States and will be exploited under its legal regime. Considering these situations, it is urgently needed to effectively operationalize the

revenue sharing scheme earlier than its expectation.

With various uncertainty and flexibility in the terms and phrases of Article 82, the practical application of the revenue sharing scheme might face serious difficulties. Some methods to ensure the payments or contributions should be required. From such a viewpoint, in the Fourth Part of my presentation, I will deal with how to effectively realize the revenue sharing scheme and how to treat differences of opinions concerning it.

4. How to ensure the payments or contributions by coastal States

(1) Possible conflict situations

I presuppose a case in which the ISA or any State Party to UNCLOS has different opinion from that of a coastal State concerning its unilateral decision of making the payments or contributions and decisions relating to it, such as, the evaluation of production, calculation of the payments etc. Compared to such a situation, I can imagine other cases in which a dispute may exist. Here, I will introduce two of them.

First, if a deposit of mineral resource lies straddling outer continental shelves of two States, regarding the payments or contributions under Article 82 the two States concerned may disagree with each other. They can treat that dispute in accordance with provisions under the Part 15 of UNCLOS.

Second, if a deposit of mineral resource lies straddling an outer continental shelf of a State and deep sea bed areas, how the payments or contributions should be made may be determined by consultation between the coastal State and the ISA. Article 142, Paragraph 1 provides that the activities in sea bed areas shall be conducted with due regard to the rights and legitimate interests of coastal States. No corresponding obligation is found under Articles concerning the outer continental shelf.

However, it is almost customary international law regarding shared natural resources that the States in utilizing such resource should conduct prior notification or prior consultation with the other interested parties. To respect the objects and purpose of that general obligation, coastal States of outer continental shelves, too, should pay due regards to the activities on deep sea bed areas and to conduct consultation with the ISA relating to the exploitation of such mineral resource including the issue of the payments or contributions under Article 82.

Now I am touching upon a difficult case.

(2) A difficult case

A difficult problem arises in the first case I have introduced before. If the ISA has a different opinion from that of a coastal State concerning its decision of the payments or contributions, how should it be dealt with? If I could describe about such a situation that there is a dispute, are the two rivalry parties, a coastal State and the ISA? Even if so, there are no provisions under the Part 15 of UNCLOS to treat such situation, and except for issues regarding the activities on deep sea bed areas, the ISA does not have a status to recourse to any of dispute settlement procedures under the Part 15 of UNCLOS.

When a State Party has a different opinion from that of a coastal State, as one arguable way it is not necessarily excluded that any State Parties to UNCLOS, surely including possible recipient States under the revenue sharing scheme, recourse to dispute settlement procedures. If any State Parties have a different opinion from that of a coastal States concerning its obligation under the revenue sharing scheme, it may be a dispute relating to interpretation or application of UNCLOS, and it should be dealt with by some of dispute settlement procedures under the Part 15 of UNCLOS.

As for adjudicatory procedures, however, whether or not such a *locus standi* is admitted is highly uncertain. Although, at least theoretically, any State Parties have a legal interest relating to interpretation or application of provisions under UNCLOS, especially provisions dealing with regimes as to which all the State Parties are potentially beneficiary, such as, the revenue sharing scheme, international adjudicatory procedures have not yet established precedents for a *locus standi* like *actio popularis*. We can easily remember the famous case entertained by the ICJ in 1966, namely South-West Africa Case, in which it denied *locus standi*, such as *actio popularis*.

The other possibility is to confer on the ISA a status of representing all the State Parties to UNCLOS to ensure appropriate implementation of the revenue sharing scheme. This solution requires some amendment of UNCLOS or a new agreement to complement it in order for realizing the revenue sharing scheme. Certainly Article 160 Paragraph 1 (f) (i) gives powers and functions to the ISA in order for operating the revenue sharing scheme under Article 82, but this relates to the so-called inside procedures of the ISA. It

does not directly indicate the ISA's representative status for all the State Parties to UNCLOS toward the coastal State concerned.

More fundamentally it is doubtful whether the State Parties will generally agree to recognize such a representative function of the ISA. As already examined in the Second Part of my presentation Article 82 does not provide provisions for that purpose. To the contrary, in the drafting process various proposals to give more power or functions to the ISA were always abortive.

Fully taking into consideration that general attitude of States, if some amendment or a complementary agreement is necessary, it should be carefully accomplished by enough consent among the State Parties to UNCLOS. In admitting the representing status of the ISA which is necessary to ensure the enforcement of the revenue sharing scheme, the relating powers or functions should be also conferred on it. Among them are, for instance, the power to collect the relevant information of the exploitation of outer continental shelves, conduct investigation, consult with the coastal State concerned, and recourse to the disputes settlement concerning the difference between it and the coastal State. We have to wait and see if such an idealistic solution could acquire much support from the State Parties to UNCLOS.

5. Conclusion

I have examined the revenues sharing scheme under Article 82 for the outer continental shelf focusing upon some critical points. The compromise in the drafting process of the provision did not achieve substantive result in the Article. It allows us neither to confirm substantive balance of interests between the conflicting camps regarding the outer continental shelf regime, nor to devise a sketch for effective realization of the revenue sharing scheme from a practical perspective.

One anticipated situation is that without some supplementary agreements to or amendments of UNCLOS the operationalization of Article 82 would face serious difficulties. Coastal States of the outer continental shelf would enjoy broad discretion within a flexible scope of interpretation of Article 82, which would threaten meaningful achievement of the objects and purpose of the revenue sharing scheme. Cooperative actions by both coastal States and the ISA, and further concerted actions by all the State Parties are urgently required for the international society to fully gain exploitation profits from resources of sea bed areas and to accomplish their equitable distribution.

A compromise is really wisdom or an indispensable tool for international society to achieve agreements among independent and sovereign States that seek for various and conflicting interests. A compromise never means empty of substantive balance of interests between conflicting parties. It never means total lack of practical grounds. Just a simple or naive compromise that enabled the adoption of the revenue sharing scheme under Article 82, however, does not provide meaningful balance between the two conflicting concepts of the common heritage of mankind and the sovereign rights of coastal States. With much patience, I really would like to hope that the international society will substantiate that shallow compromise so as to put in motion the revenue sharing scheme in satisfying the both conflicting camps.

This is the end of my remarks.

I really thank you all for your attention and patience.