International Royalty and Continental Shelf Limits: Emerging Issues for the Canadian Offshore

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Article 82 of the United Nations Convention on the Law of the Sea, 1982, provides a novel obligation in international law that is likely to become operative within the decade. It establishes an international royalty on production from the utilization of non-living resources (such as oil and gas) on the continental shelf beyond 200 nautical miles, but within the outer limit of a coastal state's jurisdiction. Producing states will have an obligation to make payments or contributions in kind that are calculated on the basis of an incremental rate applicable as from the sixth year of production and reaching a ceiling of 7% of production by the twelfth year. The receipts are to be paid to the International Seabed Authority and in turn will be distributed to other states parties to the UN Convention, in particular to developing countries. At this time it is unclear how this provision will be implemented. Canada has an interest in this provision because it is already issuing exploration licenses in the royalty-eligible areas of its Atlantic continental shelf. This paper explains this provision, highlights interpretative difficulties and discusses issues of international royalty implementation in the Canadian context.

L'article 82 de la Convention des Nations Unies sur le droit de la mer (UNCLOS) de 1982 impose, en droit international, une nouvelle obligation qui prendra vraisemblablement effet au cours des dix prochaines années. Il établit des contributions internationales au titre de l'exploitation des ressources non biologiques (p. ex., le pétrole et le gaz) du plateau continental au-delà de 200 milles marins, mais en deçà de la limite extérieure du territoire qui est du ressort de l'État côtier. Les États producteurs ont l'obligation d'acquitter chaque année, à compter de la sixième année de production, des contributions en nature établies selon un taux progressif qui atteint un plafond de 7 pour cent de l'ensemble de la production la douzième année. Les contributions sont versées à l'Autorité internationale des fonds marins qui les distribue entre les États signataires de la Convention, en particulier aux pays en développement. Pour l'instant, la façon dont cette disposition sera mise en œuvre n'est pas claire. Le Canada a un intérêt dans cette disposition parce qu'il délivre déjà des permis d'exploration dans les zones de son plateau continental Atlantique visées par l'article 82 de l'UNCLOS. Cet article explique l'article 82, fait ressortir les difficultés que soulève son interprétation et discute de questions relatives à la mise en œuvre des redevances internationales dans le contexte canadien.

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The authors are grateful to the following persons for their assistance during the research of this paper: Galo Carrera, President, Geometrix, Halifax, Nova Scotia, and member of the United Nations Commission on the Limits of the Continental Shelf; Michael W. Lodge, Chief, Office of Legal Affairs, International Seabed Authority, Kingston, Jamaica. The research and editing assistance of Peter Sullivan, Law Student, Patterson Palmer, is also gratefully acknowledged. The assistance of the WMU library is also gratefully acknowledged.
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Introduction
Since the first United Nations Conference on the Law of the Sea (UNCLOS I) in 1958, Canada has consistently played an important role in the development of the law of the sea. Much of that role has been played either in negotiation fora, such as Canadian attempts to broker a seaward limit for the territorial sea and fishing zone at UNCLOS II in 1960, or through measured unilateral actions, such as the Arctic Waters Pollution Prevention Act, which influenced the development of environmental jurisdiction in the exclusive economic zone (EEZ) at UNCLOS III between 1973-1982 and its insertion in the United Nations Convention on the Law of the Sea, 1982 (LOS Convention). Canada became a party to the LOS Convention

on 6 November 2003 and is poised to contribute yet again to the development of the law of the sea, this time with reference to a ground-breaking international royalty. Under Article 76 of this instrument Canada may claim an extended continental shelf that extends far beyond the 200-nautical mile (M) exclusive economic zone (EEZ). According to Article 82 the development of the non-living resources of this new ocean real estate is subject to a royalty payable to the International Seabed Authority, a new intergovernmental organization. Offshore oil and gas exploration off Canada’s Atlantic coast recently has moved outside the 200M limit and any future production in this area will become “royalty eligible.” It appears that at this time few coastal states have discovery licence activity on the extended continental shelf. Accordingly, Article 82 may well be first tested by Canada or the United States and possibly within the decade.

Article 82 states that:

1. The coastal State shall make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

2. The payments and contributions shall be made annually with respect to all production at a site after the first five years of production at that site. For the sixth year, the rate of payment or contribution shall be one per cent of the value or volume of production at the site. The rate shall increase by one per cent for each subsequent year until the twelfth year and shall remain at seven per cent thereafter. Production does not include resources used in connection with exploitation.

3. A developing state which is a net importer of a mineral resource produced from its continental shelf is exempt from making such payments or contributions in respect of that mineral resource.

4. The payments or contributions shall be made through the Authority, which shall distribute them to 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 amongst them.4

This paper builds on an earlier article by the authors suggesting Article 82 has not been addressed by either the Canadian petroleum law regime or the Oceans Act,5 and that it is likely to be an issue for offshore development in the Atlantic region.6 This paper examines the LOS Convention provision in question, explains its content, attempts to explain how the international royalty might apply in the absence of a suitable precedent and identifies its potential consequences. As part of the discussion, this paper also addresses the law and administrative process for determining the outer limits of the extended continental shelf. The diplomatic history of the law of the sea shows that the acquisition of an extended continental shelf by broad margin states was an integral part of a package that included the international royalty. Given the dearth of literature on this subject, the paper explores potential problems of interpretation of Article 82 and its implementation.7

I. The Extended Continental Shelf

Prior to UNCLOS III, the full geographical extent of coastal state rights over the continental shelf were uncertain. Whereas the coastal state had a right to a continental shelf, in theory this right did not extend to the entire continental margin; however, the exploitability criterion in Article I of the

4. Supra note 2, Article 82. The reader will note that Article 82 speaks of “payments” and “contributions in kind” rather than of royalties or taxes. Given the basis upon which such payments and contributions are to be made (based on production of non-living resources) it is the view of the authors that this is most accurately described as a royalty and therefore that terminology is used consistently throughout this paper. Such payments or contributions are effectively an international royalty obligation of the producing state to the International Authority under the LOS Convention.
5. S.C. 1996, c. 31, s. 17.
Geneva Convention on the Continental Shelf, 1958, could have eventually led to claims encompassing the continental margin. This uncertainty was resolved not through unilateralism, but by virtue of negotiations at UNCLOS III. Thus, at law, the specific inclusion of the entire continental margin within the rights of the coastal state (including when this extended beyond 200M), was not the product of custom, but rather a negotiated outcome of UNCLOS III. The coastal state entitlement to a normal and extended continental shelf is provided in Article 76 of the LOS Convention. It is useful to distinguish between the normal and extended continental shelf entitlement because Article 82 does not apply to the former.

1. Normal Continental Shelf Entitlement

In general, the LOS Convention defines the continental shelf as:

... the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend to that distance.

The entitlement is based on a combination of geographical and distance criteria. Prior to the LOS Convention, the Geneva Convention on the Continental Shelf defined the Continental Shelf as:

(a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

The negotiators of the 1958 convention did not have the continental margin in mind when they purposefully chose the continental shelf as a concept; however, the vague and open-ended reference to exploitability enabled expansionist claims beyond what was intended by the drafters.

9. Supra note 2, Article 76(1).
10. Supra note 8. The North Sea Continental Shelf Cases, 1969, confirmed that the continental shelf doctrine had become customary international law; Judgment, ICJ Reports 1969, 3.
Exploitability opened the door to "creeping jurisdiction" by states that could invoke technological development as a legitimate basis for new exclusive claims. In the LOS Convention, Article 76 was an attempt to fully define and put an end to creeping jurisdiction by, on the one hand, including the continental margin in the legal definition of the shelf and, on the other, providing a distance criterion which acted as both entitlement and limit to the shelf claim. For the majority of coastal states, therefore, the normal shelf entitlement is capped by a 200M limit.

2. Extended Continental Shelf Entitlement
For those coastal states whose continental margin extends beyond 200M (i.e., so called broad margin states), the LOS Convention provides them with the possibility of claiming an extended continental shelf. There are as many as fifty or more coastal states in a position to do so. "Extended," is not a legal term and is a simplified reference to margin extensions outside 200M. The outer limit of the extended shelf may be defined by either of two methods:

   (i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or

11. This concern was brought out in the seminal speech of Ambassador Arvid Pardo, Permanent Representative of Malta to the United Nations, which led to UNCLOS III and eventually the LOS Convention. See "Ocean Space, Seabed, Common Heritage of Mankind," First Statement to the First Committee of the General Assembly, 1 November 1967, in Arvid Pardo, The Common Heritage: Selected Papers on Oceans and World Order 1967-1974 (Malta: Malta University Press, 1975) at 1-41 [Pardo, Common Heritage].

12. The other limitation is similar claims by neighbouring coastal states, especially in enclosed or semi-enclosed seas.

13. During UNCLOS III it was thought that there were thirty-three broad margin states. Prescott used maps produced by the U.S. State Department (1973) and the United Nations (1977) to conclude that there are twenty-nine margins wider than 200M, possibly involving fifty-six coastal states; Prescott, supra note 3 at 55-59. The precise number of claims depends on whether oceanic, and not only continental ridges, may be included. One estimate is thirty to forty states; see George Taft, "Solving the Ridges Enigma of Article 76 of the United Nations Convention on the Law of the Sea," online: <http://www.gmat.unsw.edu.au/ablos/TAFT.PDF> (accessed on 16 July 2003). A more recent study by Carrera focusing on regions suggests that the number of claimant states could be significantly higher than anything estimated to date. See Galo Carrera, "Geographical Scope and Scientific Challenges posed by Article 76 to the United Nations Convention on the Law of the Sea," presented at UNCLOS and the Delineation of the Continental Shelf: Opportunities and Challenges to States, a Commission on the Continental Shelf Open Meeting, Seventh Session, Trusteeship Council, UN Headquarters, New York, 1 May 2000; see also Peter Croker, "The Mandate and Work of the Commission on the Limits of the Continental Shelf" (ibid.).
(ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.\textsuperscript{14}

Paragraph 7 provides for the delineation of the seaward limit through the use of straight lines not exceeding 60M connecting fixed points. For the purposes of (ii), the foot of the slope "shall be determined as the point of maximum change in the gradient at its base."\textsuperscript{15} In both (i) and (ii) the fixed points must not exceed 350M from the coast or 100M from the 2,500-metre isobath.\textsuperscript{16} As can be discerned from the treaty text, these provisions contain much technical complexity and will necessitate a significant amount of scientific knowledge of a given area in order to be applied. This has been recognized by the United Nations Commission on the Limits of the Continental Shelf, an international body of experts set up and charged by the LOS Convention to receive and consider submissions by coastal states for the determination of the seaward limit of the shelf.\textsuperscript{17} As tasked by the LOS Convention, the Commission has produced guidelines to guide states in their submissions.\textsuperscript{18} The Russian Federation is the first coastal state to make such a submission to the Commission.\textsuperscript{19}

In Canada, the \textit{Oceans Act} defines the continental shelf in a manner consistent with the text of Article 76:

(1) The continental shelf of Canada is the seabed and subsoil of the submarine areas, including those of the exclusive economic zone of Canada, that extend beyond the territorial sea of Canada throughout the natural prolongation of the land territory of Canada

\begin{itemize}
  \item[(a)] subject to paragraphs (b) and (c), to the outer edge of the continental margin, determined in the manner under international law that
\end{itemize}

\begin{enumerate}
  \item[14.] LOS Convention, \textit{supra} note 2, Article 76(4)(a).
  \item[15.] \textit{Ibid.}, Article 76(4)(b).
  \item[16.] \textit{Ibid.}, Article 76(5). However, note Article 76(6) which provides that "Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to submarine elevations that are natural components of the continental margin, such as plateaux, rises, caps, banks and spurs." The latter sentence suggests that if the mentioned geomorphological features are present, the 350M limit may not necessarily apply.
  \item[17.] \textit{Ibid.}, Annex II.
  \item[18.] Rules of Procedure of the Commission on the Limits of the Continental Shelf, CLCS/Rev. 3 (6 February 2001); Modus Operandi of the Commission, CLCS/L.3 (12 September 1997); Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf, CLCS/11 (13 May 1999) and CLCS/11/Add. (3 September 1999).
  \item[19.] "Russian Federation First to Move to Establish Outer Limits of its Extended Continental Shelf," UN Press Release, SEA/1729, 12 December 2001.
\end{enumerate}
results in the maximum extent of the continental shelf of Canada, the outer edge of the continental margin being the submerged prolongation of the land mass of Canada consisting of the seabed and subsoil of the shelf, the slope and the rise, but not including the deep ocean floor with its oceanic ridges or its subsoil;

(b) to a distance of 200 nautical miles from the baselines of the territorial sea of Canada where the outer edge of the continental margin does not extend up to that distance; or

(c) in respect of a portion of the continental shelf of Canada for which geographical coordinates of points have been prescribed pursuant to subparagraph 25(a)(iii), to lines determined from the geographical coordinates of points so prescribed.\(^{20}\)

Canada is a broad margin state in a position to claim extended shelves under (a) in the Atlantic and Arctic regions.\(^{21}\) In the Pacific, where it is determined that the continental margin is not as extensive, a continental shelf in accordance with (b) applies. No precise outer limits for the extended continental shelf have been established in any of Canada’s oceans. However, the legislated outer limits are deemed to apply despite lack of precise determination and the absence of any current regulations to this effect by the Governor in Council. Should any doubt arise as to whether a particular area falls within the continental shelf of Canada,\(^{22}\) a certificate by the Minister of Foreign Affairs would be determinative of the issue.\(^{23}\) This executive certification is useful for Canadian domestic purposes (i.e., governmental and court jurisdiction). Eventually, it is expected that precise outer limits in the Atlantic and Arctic regions will be set out by the Governor in Council through regulation.\(^{24}\) Full international recognition of a formal determination of outer limits requires successful completion of the LOS Convention procedure described below.

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20. *Supra* note 5.
22. "For greater certainty, paragraphs (1)(a) and (b) apply regardless of whether regulations are made pursuant to subparagraph 25(a)(iv) prescribing geographical coordinates of points from which the outer edge of the continental margin or other outer limit of the continental shelf of Canada may be determined." *Supra* note 5, s. 17(2).
The Canada-Newfoundland Offshore Petroleum Board (CNOPB) has issued several exploration licences, and at least one significant discovery licence, for operations outside the 200M limit. Exploration licences for parcels beyond the 200M limit have been issued to Petro-Canada, Esso, Mobil, Husky, ExxonMobil and others and their respective partners. Most of the wells drilled to date under exploration licences have been abandoned. The North Dana I-43 well, for which a significant discovery license was issued to Mobil and partners, has also been abandoned. Petro-Canada drilled the Mizzen L-11 well in early 2003.

The CNOPB has issued a call for bids NF03-1 for fourteen parcels, all but two of which are located, in whole or in part, beyond the 200M limit. The issues of determination of the seaward limits of the extended continental shelf and the international royalty payable under Article 82 are, and will be, of great interest to a number of oil and gas companies involved in the Atlantic Canada offshore. A significant amount of activity and interest has been, and will be, focused beyond the 200M limit, particularly on offshore Newfoundland and Labrador, and possibly on offshore Nova Scotia.

3. Procedure For Claiming an Extended Continental Shelf
The procedure that Canada would have to go through in order to finalize the seaward limits of the extended continental shelf and ensure their full international recognition is set out in Annex II of the LOS Convention and the guidelines developed by the UN Commission on the Limits of the Continental Shelf. The UN Commission's functions are to provide scientific and technical advice in data preparation, to consider submissions by broad margin states and to make recommendations thereto in accordance with Article 76. Canada would be required to submit particulars of intended limits and supporting scientific and technical evidence.

25. The North Dana significant discovery license is the first such license outside 200M. For information on the various exploration licenses outside 200M off Newfoundland, see online: CNOPB <www.cnopb.nfnet.com>.
27. Supra note 2, Annex II, Art. 3. In relation to the Bay of Bengal, the Commission is also required to refer to the Statement of Understanding Concerning a Specific Method to be Used in Establishing the Outer Edge of the Continental Margin, in Final Act of the Third United Nations Conference on the Law of the Sea, 1982, Annex II, in The Law of the Sea, supra note 2, at 183-184. The Commission operates through Sub-Commissions, but the final decision on recommendations to the coastal state is taken by the Commission.
The Commission does not have regulatory authority and where it disagrees with the contents of a state submission, it can only provide recommendations to the submitting state. In reality, however, the LOS Convention has empowered the Commission to legitimize extended shelf claims. The Commission has had opportunity to provide the Russian Federation with such recommendations. Where the coastal state disagrees with the recommendations provided, it may make a revised or new submission. The LOS Convention is silent as to what happens if a coastal state decides not to re-submit or if differences with the Commission are not resolved. The current Russian reaction to the Commission's recommendations is a test case to be monitored.

The Geological Survey of Canada has already taken preliminary steps in preparation for a future Canadian claim. There are several preliminary questions that will need to be addressed not only at the scientific and technical level, but also at high levels of policy-making as part of a cost-benefit analysis at the national level. Beyond a desktop study, more geodetic, geological, geophysical and hydrographic data will be needed to buttress potential claims for an outer limit as far seawards as 350M and satisfy the international scientific and technical scrutiny imposed by the Commission. In addition to data submission, Canada will be expected to explain technical procedures and scientific methodologies employed in its implementation of Article 76. State parties have ten years to make such claims. Canada will have until December 2012 to make a submission to the Commission (i.e., ten years since ratification of the LOS Convention).

29. Supra note 2, Annex II, Art. 8.
33. For those state parties that ratified the LOS Convention after it came into force, such as Canada, the convention enters into force 30 days from the date of deposit of the instrument of ratification. LOS Convention, supra note 2, Article 308(2).
II. Development of The International Royalty: The Diplomatic History of Article 82

In order to better interpret the intent and meaning of Article 82, it is useful to review the history of the negotiations, which led to the final wording of that article.

More than twenty years after the adoption of the LOS Convention, the close relationship between Articles 76 and 82 is hardly mentioned in the academic literature. Yet, from the very outset of UNCLOS III, the ideas behind the two were closely intertwined. Article 82 is a unique provision in the LOS Convention as it is the only one that provides for an international royalty to be levied for an activity within national jurisdiction. This is different from the fees that registered pioneer investors have to pay for their licences and activities in the international seabed area (which is clearly outside national jurisdiction) and the mineral activities which fall under the superintendence of the International Seabed Authority.

The national appropriation of the extended continental shelf was considered by many at UNCLOS III as an encroachment on the international seabed area, and thus on the common heritage of mankind. In his famous 1967 UN speech, Ambassador Arvid Pardo of Malta had proposed that

(1) The seabed and the ocean floor are a common heritage of mankind and should be used and exploited for peaceful purposes and for the exclusive benefit of mankind as a whole. The needs of poor countries, representing that part of mankind which is most in need of assistance, should receive preferential consideration in the event of financial benefits being derived from the exploitation of the seabed and ocean floor for commercial purposes.

(2) Claims to sovereignty over the seabed and ocean floor beyond present national jurisdiction, as presently claimed, should be frozen until a clear definition of the continental shelf is formulated.

Pardo proposed two revolutionary ideas: (1) that national claims would be frozen until such time as a definition that would clearly limit national continental shelf claims would be developed; and (2) that the area outside national jurisdiction would be developed for every nation’s benefit, but

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with preferential consideration for developing countries. In subsequent speeches to the UN, Pardo further developed the idea that “International Ocean Space Institutions” be responsible for the common heritage and be given powers to allocate development rights and undertake ocean management. The idea that there should be equitable sharing of benefits from the development of the international seabed area was adopted at an early stage.

Pardo’s revolutionary ideas were not limited to the international seabed area. Pardo also advocated that the “coastal state should contribute to the international institutions a percentage of the revenue received from the exploitation of the living and non-living resources of a large zone of ocean space within its jurisdiction.” Within what is now the EEZ, Pardo advocated a scale of contributions tied to the development of both living and non-living resources that the coastal state would make to international institutions.

Although the 1970 UN General Assembly Resolution 2749 would declare the international seabed area common heritage of mankind and beyond national appropriation, it was not possible to freeze national claims to emerging maritime zones. Consequently, creeping jurisdiction would still continue at the expense of the common heritage until a new law of the sea defined the outer limits of national jurisdiction. Pardo may have failed to obtain a freeze, but he influenced many Seabed Committee and UNCLOS III delegations resist encroachments on the common heritage. Where resistance was not possible, there had to be a quid pro quo in the

37. Referring to a future legal regime for the international seabed area, Resolution 2749 provided that the “regime shall, inter alia, provide for the orderly and safe development and rational management of the area and its resources and for expanding opportunities in the use thereof and ensure equitable sharing by States in the benefits derived therefrom, taking into particular consideration the interests and needs of the developing countries, whether land-locked or coastal.” Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil thereof, beyond the Limits of National Jurisdiction, UN General Assembly Resolution 2749, (XXV), 17 December 1970. There were 108 states that voted in favour, fourteen abstentions, and with no state voting against.
39. Pardo envisaged four zones as follows: Area 1-100 miles from the coast: no contribution; Area 2-100-150 miles: 25%; Area 3-150-170 miles: 50%; Area 4-175-200M: 75%. Ibid., at 219-220. Writing in 1972, he optimistically guessed that around $200 million a year would be generated to the international institutions from hydrocarbon development alone. Ibid. at 221.
40. Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, established by UN General Assembly Resolution 2467 A (XXII), 21 December 1968.
conference's package deal. The concept that the coastal state should share or make a financial contribution on development within its jurisdiction for the benefit of others would survive, albeit in an inchoate form.

The Seabed Committee was convened in 1968 by the General Assembly to develop an agenda for the forthcoming UNCLOS III. The Committee provided a forum for Pardo's embryonic ideas. In 1971, Malta submitted the Draft Ocean Space Treaty as an attempt to envision what a new global law of the sea convention could look like. Within this instrument, Article 61 provided:

1. The coastal state shall transfer to the International Ocean Space Institutions a portion of the revenue obtained from the exploitation of the natural resources of national ocean space.

2. The Institutions shall prepare a draft convention defining the contribution payable by coastal states to the International Ocean Space Institutions under paragraph one of this Article and the modalities of payment.

Malta proposed sharing of revenue from all resource development within national jurisdiction, to be payable to an international organization. It stopped short of calling this innovative provision a tax or royalty, couching it instead as an obligation to make a contribution, with the moral rationalization that this was owed to the international community. The new maritime zones emerging at the time (especially the EEZ and the extended continental shelf) were encompassing the majority of marine resources and this reinforced the responsibility to share even more. Utopian as it was, the idea would eventually be supported by the United States delegations to the Seabed Committee and UNCLOS III as a key element in the

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43. See the Introduction to the Draft Ocean Space Treaty, ibid. at 387-388. The Introduction introduced this Article as an "important innovation." In a footnote to Article 61 the following rationale was put forward: "It is believed that a contribution by the coastal state of a proportion of the revenue received through the exploitation of the natural resources of national ocean space is justified, inter alia, by the fact that the coastal state is likely to receive benefits not otherwise easily attainable through the rational management of natural resources beyond its jurisdiction." Ibid. at 421.
overall compromise in a revised continental shelf regime.\textsuperscript{44}

At the outset of UNCLOS III, participating states agreed that consensus would be the guiding decision-making process, and only when all efforts at securing consensus were exhausted would a vote be taken. It was agreed that the resulting convention would be a package deal, thus allowing states to negotiate freely on the details and then decide on the package as a whole. A procedure adopted to assist consensus-building was the preparation of occasional draft treaty texts that reflected the state of negotiations of the overall package deal. Frequently, alternative text or text placed in square brackets indicated items still undergoing consensus-building. These rules of procedure were very important for the negotiation of Article 82 and, as will be seen below, facilitated the evolution of a few, frequently competing ideas, from one draft text to another. Consensus necessarily meant that Article 82 would be a compromise provision, both on its own and in relation to other treaty provisions. Annex I at the end of this paper provides the different formulations of this provision in the various negotiating texts of UNCLOS III.

Continental shelf matters during UNCLOS III were negotiated in the Second Committee. Very early into the negotiations the extent of national sovereign rights over the continental shelf was a divisive issue and reflected a broad spectrum of views. Clearly, many coastal states, especially broad margin states, saw this as an opportunity to advance their claim for an extended shelf, a claim no individual coastal state would likely have made on its own. Many developing states remained suspicious that the continental shelf regime had primarily served the interests of developed states and wanted this rectified.\textsuperscript{45} Land-locked and geographically disadvantaged states either opposed an extended continental shelf, which they perceived to benefit coastal states exclusively, or expected a

\textsuperscript{44} In its summary report of the last session of the Seabed Committee (2 July-24 August 1973), the U.S. delegation reported that some revenue sharing from mineral exploitation in the coastal state seabed economic area was contemplated. See Myron H. Nordquist & Choon-ho Park, eds., \textit{Reports of the United States Delegation to the Third United Nations Conference on the Law of the Sea} (Honolulu: Law of the Sea Institute, 1983) at 45. See also Nandan & Rosenne, \textit{supra} note 7 at 933.

\textsuperscript{45} See for instance the comments of the Singaporean delegate at the Second Session: "The history of the development of the concept of the continental shelf showed that it had been evolved to serve the interests of a few advanced developed countries. The Conference should have the courage to rectify such injustices." \textit{Third United Nations Conference on the Law of the Sea: Official Records}, 2\textsuperscript{nd} Session, Caracas, 20 June-29 August 1974 (New York: United Nations, 1975) at 151.
system of equitable compensation. Some land-locked states proposed that they be granted access to mineral resources. One land-locked state felt that the extension of continental shelves to the edge of the continental margin would greatly reduce the international seabed area and that it "was questionable whether an area so truncated to that extent would even justify the establishment of an international authority to administer it." Some states felt that coastal states were entitled to the full extent of the continental shelf but that "they should share with the international community a portion of the natural resources of their continental shelves lying beyond 200M." Other states simply objected to the notion of sharing as they perceived a potential erosion of property rights.

During the Second Session in Caracas in 1974, the U.S. proposed a compromise that provided for coastal state jurisdiction over the continental margin coupled with revenue-sharing. A Dutch proposal added a scale of contributions using distance and depth as criteria. Although several broad margin states continued to resist revenue-sharing and several land-locked states opposed exclusive rights beyond 200M, the U.S. proposal attracted support. By August 1974, an informal working paper contained the first precursor provision to Article 82 with a statement of principle that the coastal state should make contributions out of its revenue from the development of its non-living resources, that the contributions would be based on a scale and that the contributions would be distributed by

46. See e.g. Uganda, Official Records, 2nd Session, ibid. at 151.
47. See for instance the proposals of Austria and the Group of Land-Locked and Geographically Disadvantaged States in response to the ISNT's Article 63. A right to participation in the development of the continental shelf of regional coastal states was claimed. They proposed, inter alia, joint ventures. The Group also anticipated the need to negotiate bilateral, sub-regional and regional agreements for this purpose. In a revision of its proposal, Austria attempted to secure preference for land-locked states. See Second Committee Informal Proposals, in Renate Platzöder, Third United Nations Conference on the Law of the Sea: Documents, Vol. IV (New York: Oceana, 1983), at 323-327.
49. See e.g., Trinidad and Tobago, Official Records, 2nd Session, ibid. at 155.
50. Burma (now Myanmar) saw "no justification for the proposals that sought to impose on coastal states an obligation to share with others part of the revenues derived from the exploration of the mineral resources of the continental shelf. The practical effect of those proposals would be to establish a regime of mixed ownership over those resources. Any such system, however, would be a serious encroachment on the existing rights of coastal states, and would be unacceptable ..." Official Records, 2nd Session, ibid. at 155.
an international authority.\textsuperscript{52} There was not yet agreement on the marine area the contribution would apply to, but the early thinking considered the possibility of areas well within the 200M limit.\textsuperscript{53} Following negotiations, a revised version of that working paper produced an alternative (albeit rough) formula that referred to the continental shelf, including areas outside the territorial sea, but had not yet focused on the extended shelf.\textsuperscript{54} By the end of the Second Session the trend appeared to be a more simplified provision, but the division between broad margin and land-locked and geographically disadvantaged states was still very wide. Particularly interesting at this time was the reference to net revenue, rather than the reference to volume or production that would appear later, and that the revenue would be distributed by the Authority on the same basis as revenue generated from the international seabed area.\textsuperscript{55}

By the end of the Third Session in 1975, there emerged a common understanding on the basic principle that coastal states make contributions related to their development of the extended shelf. The text captured by the Informal Single Negotiating Text (ISNT) on this principle would


\textsuperscript{53} "The rate of contribution shall be ... per cent of the revenue from exploitation carried out within 40 miles or 200 metres isobath of the ... zone, whichever limit the coastal State may choose to adopt, and ... per cent of the revenue from exploitation carried out beyond 40 miles or 200 metres isobath within the ... zone." Provision XII(2), \textit{ibid.} at 292.

\textsuperscript{54} Formula B: "The coastal State in the exercise of its rights with respect to the non-renewable natural resources of the continental shelf: (a) Shall comply with legal arrangements which it has entered into with other contracting States, their instrumentalities, or their nationals in respect to the exploration and exploitation of such resources; shall not take property of such States, instrumentalities or nationals except for a public purpose on a non-discriminatory basis and with adequate provision at the time of taking for prompt payment of just compensation in an effectively realizable form; and (b) Shall pay, in respect of the exploitation of such non-renewable resources seaward of the territorial sea or the 200-metre isobath, whichever is further seaward (insert formula), to be used, as specified in Article ..., for international community purposes, particularly for the benefit of developing countries." Informal Working Paper No. 3/Rev. 1, 12 August 1974, Provision XIII, in Platzöder, \textit{supra} note 47, Vol. III at 301.

\textsuperscript{55} The two alternative formulas that emerged in Provision VIII of Informal Working Paper No. 4/Rev. 2, 27 August 1974, were diametrically opposed. Formula A: "1. All States deriving revenues from the exploitation of the non-living resources of the ... zone shall make contributions to the international authority at the rate of ... per cent of the net revenues. 2. The international authority shall distribute these contributions on the same basis as the revenues derived from the exploitation of the international sea-bed area." Formula B: "The sovereign rights of the coastal State over its continental shelf are exclusive. The revenues derived from the exploitation of the continental shelf shall not be subject to any revenue sharing." Platzöder, \textit{supra} note 47, Vol. III at 362.
survive the various negotiating texts and find a place in the final version of Article 82(1) (see Annex I). By this time the majority of delegations were in favour of the coastal state having at least 200M of EEZ and continental shelf, and the remaining question was related to the criteria for determining the outer limit of the shelf (now understood as margin) where this extended beyond 200M. However, the negotiation of the latter could not proceed without a compromise on revenue-sharing, and this was considered to be the only way to achieve widespread support for the text. Despite the advances on drafting, the Group of Land-Locked and Geographically Disadvantaged States first lobbied for rights of participation in the exploration and exploitation of continental shelf resources, and when this did not proceed very far, proposed the making of payments or contributions in kind. There was a proposal for a five percent rate for the area within 200M, and ten percent for beyond, but this did not gather sufficient support. A U.S. proposal left the decision to decide the form of the payment or contribution to the discretion of the coastal state and the procedure would be agreed upon by parties to the convention. Another proposal included a provision dealing with the failure of a coastal state to make the required payment or contribution.

Other major points of agreement in the ISNT text were the principle of a graduated rate payment system and that payments would be made to an international organization (the Authority being one possibility) for distribution to developing countries (see Annex I). There was disagreement as to whether broad margin developing states should be exempted from the contribution.

The position of the U.S. on how revenue-sharing might work deserves particular attention since it influenced the negotiation of the provision. At

58. Proposals of the Group and Austria concerning Article 69 (ISNT II), dated 11 April 1976, Platzöder Vol. IV, supra note 47 at 325-327. Even at this stage, however, the two proposals suggested payments and contributions concerning development on shelf areas at a depth of 200 metres or 50 miles from the coast.
59. Austria, see Platzöder, ibid., Vol. IV at 325-326.
60. U.S. proposal for Article 69 (ISNT II), in Platzöder, ibid., Vol. IV at 326.
61. ISNT II, Article 69(5) as proposed by the group of Land-Locked and Geographically Disadvantaged States: "If a State concerned fails to comply with the provisions of this Article the International Authority may take appropriate measures in accordance with the powers and functions conferred upon it by this Convention." Platzöder, ibid., Vol. IV at 327.
that time the U.S. was ready to agree to revenue-sharing outside 200M (as compared to earlier willingness to consider sharing beyond the territorial sea or the 200-metre isobath).\textsuperscript{62} It considered the need for an initial grace period of five years (i.e., a period to enable some initial cost-recovery and during which the revenue-sharing would not apply), after which the contribution would be at the rate of one percent for the sixth year, increasing thereafter by one percent per year until the tenth year when it would reach five percent.\textsuperscript{63} The latter figure would remain the ceiling for subsequent production. The reasoning was that the more economically productive phase of a well would commence after the first five years of production. The applicable value to determine the contribution was thought to be the wellhead value. The U.S. disagreed with an alternative proposal to have profit-sharing instead (i.e., contribution based on the net) because of the perceived difficulties of unpredictable costs in deep drilling and “great difficulty in reaching agreement among States of differing economic systems on what costs can be deducted from gross profits to compute net revenues.”\textsuperscript{64} In fact, the text that would finally emerge in the LOS Convention would not contain any reference to net revenue or deduction of costs (other than production not including “resources used in connection with exploitation”), indicating that the royalty would apply to gross production. It seems that the expectation at the time (though it would likely cause great difficulty today) was that developers on the extended continental shelf were expected to recover a substantial portion of their development costs during the grace period. From these discussions, it does not appear that further consideration was given to ongoing production costs until the end of the life of a field that could be deducted after the contribution rule started to apply. Also, it seems that the hypothetical scenarios considered were in relation to hydrocarbons, even though the payment or contribution would apply to any non-living resource and that cost-recovery might operate very differently.

The negotiations from the Fourth to Sixth Sessions between 1976-1979 would gradually resolve many differences over coastal state contributions and area of application. At the Fifth Session, the Second Committee established a number of negotiating teams to focus on priority questions, one of which (NT 6) focused on payments and contributions in respect of the exploitation of the continental shelf beyond 200M. The discussions on

\textsuperscript{62} Ibid. at 99.
\textsuperscript{63} Ibid.
\textsuperscript{64} Ibid.
Article 76 continued to be closely related to those on Article 82. Indeed, the payment or contribution was a “necessary adjunct” to a formula that would define the continental margin either in terms of a fixed distance from the foot of the slope or fixed sedimentary thickness.\(^6\)

The Revised Single Negotiating Text (RSNT) contained the principal architecture of the future Article 82 (see Annex I).\(^6\) There was by then more widespread support for application to the extended shelf.\(^6\) The provision under negotiation at that time contained a grace period of five years, commencement of payment in the sixth year, a scale with a gradual increase of one percent per year, and a ceiling of five percent. But there were still loose ends. Whereas there was agreement that the payment or contribution be based on the value or volume of production, no final agreement on the full extent of the grace period and the ceiling of the contribution was reached. This would remain the case with the first version of the Informal Composite Negotiating Text (ICNT) (see Annex I).\(^6\) Differences would remain also in relation to which, if any, developing countries ought to be exempted from the obligation to share revenues and whether the payment should be made to the Authority.\(^6\) The Netherlands submitted a proposal that departed considerably from the then-emerging consensus.\(^7\) These differences would finally be resolved with the first revision of the ICNT and the full text of Article 82 as it is in the LOS Convention would

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\(^6\) Even the latest proposal of Austria in response to the RSNT, Article 70, had now accepted the extended shelf as the basis of the payment or contribution. See Platzöder, ibid., Vol. IV at 471.
\(^6\) For instance the US proposed the following Paragraph 4 to RSNT Article 70: “The payments or contributions referred to in paragraphs 1 and 2, shall be made to an appropriate entity of the United Nations. The Parties to this Convention shall agree on necessary payment and other relevant procedures. The entity shall distribute these payments to States Parties to this Convention on the basis of equitable sharing criteria, taking into account the interests and needs of developing countries, especially the land-locked and geographically disadvantaged among them, as well as developing countries which have made payments or contributions in accordance with paragraph 1 and 2 of this article.” Platzöder, supra note 47, Vol. IV at 471.
\(^7\) Proposal for Article 82 dated 17 April 1979, in Platzöder, ibid., Vol. IV at 516. The basic principle advanced was that any shelf extension occurring at the expense of the common heritage would be subject to “an equitable and practicable system of revenue-sharing.” It proposed that the charge be a percentage of the gross proceeds of all sold production, with two separate periods operating. In order for this formula to work, the proposal included supervision through independent accountancy. Developing countries were to be exempted from the charge.
It was at that time that agreement was reached on the maximum rate of seven percent.

Pending agreement on Article 76, consensus was about to be reached on the final text of Article 82. Unfortunately, the land-locked and geographically disadvantaged states were not able to achieve any meaningful right to participate in the development of continental shelves in the same region. In 1979, creative thinking on the part of this group of states would lead to a proposal in NT 6 to establish a Common Heritage Fund (CHF) which was fully explained in a background paper distributed at the 1980 New York Session. This would be one of the last efforts at introducing a major new element into the emerging text of the convention to enable these states to reap more benefits. The proposal was mainly targeted at Article 56 on the EEZ, but it also addressed Article 82. Insofar as the EEZ was concerned, these states reasoned that the EEZ was a new zone that was going to reduce the international seabed area, and therefore should be subject to international payments or contributions in kind. They stated that:

In our view the case for the CHF is very strong. In many forums the world community has declared that it intends to establish a New International Economic Order, based on a redistribution of global resources. However, very little has been done to move us toward that goal. We think that the Common Heritage Fund is a logical — if rather modest — first step toward the New International Economic Order.


72. See the 1978 draft resolutions of the Group and Austria, where the demand to participate is significantly less demanding than earlier, advocating a possibility of participation, in Platzöder, supra note 47, Vol. IV at 512-514.

73. Introduced on 17 August 1979. The original idea was advanced by Nepal in 1978. See also Letter to all Heads of delegations by the Organizing Committee of the Group for the Common Heritage Fund (signed by Austria and Nepal), 12 February 1980, in Platzöder, ibid., Vol. IV at 531. The other countries in the group were Afghanistan, Bolivia, Lesotho, Singapore, Uganda, Upper Volta and Zambia. See also "Background Paper on the Common Heritage Fund Proposal," New York Session 1980, in Platzöder, ibid., Vol. IV at 528-530 ["Background Paper"].

74. "Background Paper," ibid. at 529
Specifically in relation to Article 82, they proposed that the payments and contributions were to be made to the Common Heritage Fund through the Authority, with the intent to distribute these to developing countries in accordance with equitable sharing criteria remaining unchanged. However, there was insufficient support for this novel initiative at this late stage of the conference. By 1980, UNCLOS III had been underway for seven years and consensus-building may have started to evidence conference fatigue. Also, as the conference continued, coastal states appeared less inclined to consent to additional conditions to the exercise of newly gained rights. Thus, there was little further change to Article 82 and whatever change occurred was cosmetic.

The LOS Convention provides little guidance as to how Article 82 might be implemented. Some of that guidance relates to functions to be performed within the Authority. There is specific provision on the regulatory tasks of the Council and the Assembly. As the executive organ of the Authority, the Council is empowered to

\[\ldots\text{recommend to the Assembly rules, regulations and procedures on the equitable sharing of financial and other economic benefits derived from activities in the Area and the payments and contributions made pursuant to Article 82, taking into particular consideration the interests and needs of developing States and peoples who have not attained full independence or other self-governing status}\ldots\]

The final consideration and approval of any such rules, regulations and procedures lies with the Assembly, and where Council recommendations are not approved, they will be referred back to the Council for reconsideration.

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75. *Ibid.* at 528.
76. E.g., replacing "developing countries" by "developing states." See Nandan & Rosenne, *supra* note 7 at 945.
77. *Supra* note 2, Article 162(2)(o)(i).
III. Interpretation of Article 82

Despite the simplicity of the basic idea and text in Article 82, textual interpretation and eventual implementation can be expected to be more complex. The text suffers from generality, lack of precision and ambiguity, partly as a result of the consensus-building process. In interpreting Article 82 and how it ought to apply, it will be necessary to be sensitive to context (i.e., the negotiating history) and the modern operational environment of offshore development. It is likely to be necessary for LOS Convention state parties to develop a common intention on how this provision will apply, possibly through the Council and Assembly of the Authority. In anticipating this exercise it is useful to consider the aspects that need clarification.

1. The Basic Obligation

The basic obligation of the coastal state consists of the making of payments or contributions in kind in respect of production from non-living resources of the continental shelf beyond 200M and within the limit of the continental margin within its jurisdiction as defined in accordance with the rules and processes of Article 76. The coastal state decides whether to discharge its obligation by means of payment of monies representing the sum due, or by contribution in kind (e.g., making available a part of the volume of the resource produced).

Article 82 imposes an international legal obligation on the state party, i.e., Canada, and not on a subnational political unit or the producer. It may be argued that in other conventions, when states intended a direct application to specific entities, they did not limit the obligation to themselves purely in their capacities as state parties, but also tended to specify the entities affected.79 For Canada, this may suggest that the payment or contribution is a federal obligation. However, there are many other provisions in the LOS Convention which provide rights and responsibilities for

state parties without identifying domestic entities, including responsibilities with regard to pollution from ships and seabed activities, and which would be implemented through legislation and other measures at the domestic level. The LOS Convention is different from other ocean treaties in that it is considered a constitution for the oceans, hence the generality of its text. Thus it would be unreasonable to conclude that the obligation necessarily falls where it lies, and that it would not be domestically implemented as to create downstream fiscal burdens.

Naturally, Canada could, as a matter of political choice, fulfil this obligation as a federal responsibility, which might well be the U.S. approach. In such a scenario an interesting analogy could be the 1992 International Oil Pollution Compensation Fund (IOPCF), where contributions are levied on the basis of imported oil. The 1992 Fund is composed of monies paid by entities in member states that receive more than 150,000 tonnes of “contributing oil” (crude or heavy fuel oil) transported by sea. While the relevant authorities in member states inform the IOPCF of quantities of oil received, the Fund invoices the entities concerned directly. State parties have the option of paying the contribution, but in reality very few states exercise this option. Canada is one such state. By regulation, Canada requires reporting of contributing oil by persons receiving more than 150,000 tonnes during the previous calendar year to the Director of the Ship-Source Oil Pollution Fund (SSOPF). The SSOPF Director then develops a national consolidated figure that is reported to the 1992 Fund, and in turn this forms the basis for the Canadian contribution. Although Canada could have chosen to have eligible industry entities pay the 1992 Fund contribution, it has refrained from such a decision at this time. Whether there will be a similar disposition to Article 82 payments or contributions remains to be seen.

80. LOS provisions in Part XII - Protection and Preservation of the Marine Environment", supra note 2.
81. International Oil Pollution Compensation Fund 1992, supra note 79.
84. A levy was paid by industry until 1976, but not since then. The Minister of Transport is empowered by statute to impose a levy for this purpose on imported or exported contributing oil, but has not applied it to date. The levy is indexed annually to the consumer price index. Report 2001-2002, ibid. at 2.
A more likely scenario is one wherein Canada would implement the international obligation through the domestic oil and gas royalty regime. In addition to adding to royalty considerations for producers, it is also conceivable that the royalty-sharing scheme with the provincial governments concerned may have to be adjusted.

2. Rising Scale for Payment of Contribution in Kind
The obligation has to be fulfilled on an annual basis commencing with the sixth year of production. Thus the first five years of production are “obligation free” and are intended as a grace period within which costs may be recovered. With the sixth year the rate of payment or contribution will be one percent of the value or volume of production at the site. Thereafter the rate will increase by one percent per year until the twelfth year, when seven percent is reached and which will remain as a flat rate for the remaining production life of the resource. It is interesting to note that production “does not include resources used in connection with exploitation,” presumably referring to, for example, gas that may be re-injected into a reservoir as a matter of good oil field practice to enhance further production or which may be flared.

Prior to Canada’s ratification of the LOS Convention, there was potential doubt as to how this provision would have applied to oil and gas projects, which could have been in production prior to ratification. The potentially different interpretations of the commencement of the grace period for a producing field are as follows:

- The grace period begins to run from the effective date of ratification of the LOS Convention.
- The grace period begins to run at the prior time of first production.85

There are no grandfathering provisions within the LOS Convention that would apply to Article 82. One way of dealing with this difficulty is to permit the commencement of the grace period from when the LOS Convention enters into force for the state concerned. Admittedly, this may result in a longer grace period than originally intended by the UNCLOS III negotiators, but then the five-year grace period is operative only when the LOS Convention is in force for the state party concerned. Although no longer an issue for Canada, it is potentially an issue for non-state parties,

85. Under this second interpretation, there would be no grace period where first production occurred more than five years prior to ratification of the LOS Convention.
such as the U.S. However, U.S. practice seems to have anticipated this situation in relation to exploration licenses in the Gulf of Mexico. A clause in exploration licenses cautions industry that a special royalty charge may be applicable in relation to future development outside 200M.

As seen earlier, the intention of the initial five "obligation free" years was to allow for some level of recovery of development costs before the royalty would apply. It might be argued that this five year royalty-free period would allow the coastal state to accumulate domestic royalties under local laws before being obliged to make payments and contributions thereafter. Alternatively, it may also be argued that the royalty-free period reflects a similar domestic arrangement in some coastal states where royalties would increase after an initial period when royalties would be at a lesser amount due to initial development costs. Another issue may be the sufficiency of the current grace period to fully recover the initial exploration and development costs, let alone continuing production costs.

3. Quantification of Payment or Contribution in Kind

It is not entirely clear what is meant by "value" of production at the site, but has been interpreted by some as referring to the "well-head value." This would suggest the market price per barrel, in the case of oil, at the wellhead. The "value" of each unit of production to the producer is arguably the "net revenue" (i.e., the revenue for the product less the costs of production). The negotiating history of Article 82 suggests, however, that a "net revenue" model which was proposed by some states was ultimately rejected due to other states anticipating difficulties in agreeing upon what costs should be deducted in arriving at a net revenue figure. It was argued that a gross production value or volume would have the virtue of easy measurement and greater certainty. On this basis it appears that "value" would be interpreted as fair market value at the wellhead.

A second argument for the interpretation of "well-head value" is based on the likelihood that "value" and "volume" were intended to be of equal value. Article 82 appears to leave it to the coastal state to determine whether there shall be a payment of value or a contribution in kind or volume. Presumably, that contribution to the Authority was expected to

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be of similar value. Therefore, an interpretation of "value" based on the "net revenue" model would result in something which could be significantly less in value than the contribution of a percentage of the volume of production at the site.

If the coastal state chooses to make payments based on the applicable percentage of the value of production, this may raise practical issues of concern to the Authority, including whether the payments would be made in a currency which may not be as easily tradeable as other world currencies. A choice to make contributions in kind raises other practical questions and difficulties including the requirement for the Authority to make transportation and risk management arrangements to receive its percentage of the volume of production. Article 82 is silent on when such payments or contributions shall be made other than that it be on an annual basis. The timing of payments or contributions may have an effect on the ultimate value, given the commodity price fluctuations.

It is likely that the uncertainty here and the modalities of the royalty cannot be addressed by the Council or Assembly of the Authority alone, and will need to be negotiated (presumably by the Secretariat of the Authority, as it may be mandated by the Council) with the state concerned.

IV. Impact of International Royalty on Offshore Development in Atlantic Canada

While the obligations under Article 82 are clearly the coastal state's, there is obviously a concern amongst those with interests beyond the 200M limit that the federal government may seek to recover all or some portion of its international royalty obligations. While this raises a concern in respect of all potential future projects beyond the 200M limit, the concerns are even more pronounced for those license areas where exploration and development costs were incurred prior to ratification and for all licensed areas for which financial commitments have been made, whether yet incurred or not. This raises a mix of legal and political issues.

For existing exploration licenses, significant discovery licenses, and production licenses at the time of ratification of the LOS Convention, several legal questions would arise in the event the federal government imposes a domestic royalty on production to mirror and fund its obligations under Article 82. Could it be argued that subjecting such licenses and projects to further production royalties would constitute an effective expropriation without compensation? Would the answer depend upon whether the government had the option to impose a payment obligation
or require delivery of a percentage of the volume of production? Could such license holders argue that they are already subject to a comprehensive royalty regime with respect to production and may not be subjected to further royalties? Would the producer’s position differ if it had entered into a royalty agreement or whether it was simply operating under a generic royalty regime?

A detailed examination of these issues is beyond the scope of this paper. It would be prudent for producers with interests beyond the 200M limit or those contemplating the acquisition of such interests to consider these questions further. It may be necessary to seek protection by way of royalty agreements or otherwise to address these concerns to the extent such protection may be available. To the extent these concerns cannot be accommodated, projects beyond the 200M limit will need to be assessed with regard to all of the potential costs, including the potential for mirror obligations to the international royalty.

If a domestic royalty regime is implemented to address Article 82, such obligations will need to be administered, which raises questions about whether existing or new governmental agencies would be required to administer such a program. A second question is whether industry or government (federal and provincial) will bear the increased administrative costs.

V. Policy Considerations

It is clear that the international royalty, if imposed on the producer, would represent a significant additional cost to the project. Clearly the possibility exists that certain projects may not be viable when this additional cost is included. Many stakeholders benefit when a project proceeds to development and production. The resulting income taxes, other taxes, salaries and wages, contributions to the economy and existing royalties would all be lost if such projects do not proceed. Clearly this is an important policy consideration for those who will decide how to fund Canada’s international royalty obligations under Article 82.

Should Canada’s treaty obligations be borne solely by the companies who have risked significant capital to explore for, develop and produce oil

89. For a detailed discussion on the benefits of royalty agreements in the Atlantic Canada offshore see Alan T. Pettie, “Are Royalty Agreements Required for Canada East Coast Offshore Oil and Gas?” (2001) 24 Dal. L.J. 151.
and gas in harsh conditions beyond the 200M limit? Is this an obligation which should be borne by all taxpayers or by the producers? Should it be a shared obligation? Given that the international royalty will be distributed by the Authority to states who are party to the LOS Convention “taking into account the interests and needs of developing countries, particularly the least developed and the land-locked amongst them,” one policy position might be that such payments represent an international redistribution of wealth based on the policy priorities of the federal government. This would be similar to Official Development Assistance (ODA), except that ODA is normally funded out of general revenues. Should the federal government look solely to the royalty revenue under the current royalty regimes as its source of funding for this international royalty? After all, one of the benefits of the LOS convention is to sanction the exercise of economic control over the extended continental shelf for a number of purposes. The federal government clearly benefits from such activities. The international royalty is merely a price to be paid for these additional benefits.

The imposition of domestic royalties on production beyond the 200M limit could create an inequity between projects which are on either side of the line. Projects with otherwise similar risks, exploration costs and development costs would nevertheless have very different economic values and feasibility thresholds. The point here is that there could be significant issues of equity among producers that could cause substantial difficulties for the governments involved. The policy and related legal issues may need to be resolved in the political forum.

Conclusions
This paper has explored several aspects of Article 82 of particular concern to the Atlantic offshore oil and gas industry and the federal and provincial stakeholders for the industry. To date there is no state practice or inter-governmental guidelines to provide guidance on how this provision in the LOS Convention might be applied. Despite the lengthy negotiations of this provision at UNCLOS III, there is surprisingly little guidance on how the provision should be implemented. Most of that discussion focused on the principle of benefit sharing, the extent of that sharing and when it would start, and finally on the institution responsible for administering the benefits. There was little consideration of the technicalities of implementation.

It can be expected that the future agenda of the International Seabed Authority will have to include deliberations on the extent of its jurisdiction in the administration of Article 82, how payments and contributions may be received, and how these funds may be used for the benefit of develop-
ing countries. It can be expected that the uncertainty that the industry will experience as a result of Article 82 will be equally shared by the Authority, since it is tasked with administering the receipts.

One way of managing that uncertainty is for Canada to participate in and contribute to the Authority’s work. As long as Canada was not a party to the LOS Convention, it could not participate in the Council or Assembly. Together with coastal states, the Council and Assembly will have an important role to play in proposing modalities for the implementation of Article 82. The thirty-six members of the Council are elected from amongst state parties. Canadian ratification of the LOS Convention has now enabled it to become a candidate for the Council and to position itself to advocate for its offshore oil and gas interests.

Canada should consider commencing a consultative process with the interested provincial governments and industry to anticipate the modalities and equities of Article 82 in the context of the Canadian petroleum law and royalty regimes. From a regional economic development perspective, it has to be borne in mind that additional financial burdens on industry in relation to what are risky and expensive developments on the extended continental shelf can mean the difference between field viability or the lack thereof. The Atlantic Provinces which are seeking a greater share of the offshore oil and gas royalty, may not be willing to share in the burden of such an international obligation. In the alternative, the federal government might need to consider whether it should assume Article 82 payments or contributions, possibly as Official Development Assistance, or an additional contribution to the UN system, or simply as a commitment similar to the Ship-Source Oil Pollution Fund payments into the International Oil Pollution Compensation Fund on behalf of Canada and large oil importers. The alternative is for the federal and provincial governments to provide more generous incentives to extended shelf producers. This, in turn, may adversely affect government revenues. In any event, the political solutions to these issues will likely involve multi-lateral consultations and negotiations.
Annex I: Evolution of Article 82 in the UNCLOS III Negotiating Texts

<table>
<thead>
<tr>
<th>ISNT, 1975, Art. 69</th>
<th>RSNT, 1976, Art. 70</th>
<th>ICNT, 1977, Art. 82</th>
<th>Art. 82 of:</th>
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<td><strong>2.</strong> The rate of payment or contribution shall be ... per cent of the value or volume of production at the site. Production does not include resources used in connection with exploitation.</td>
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<td><strong>3.</strong> The International Authority shall determine the extent to which developing countries shall be obliged to make payments or contributions provided for in paragraphs 1 and 2.</td>
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<td><strong>3.</strong> A developing country 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>
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<td><strong>4.</strong> The payments or contributions provided for in paragraphs 1 and 2 shall be made to the International Authority on terms and procedures to be agreed upon with the Authority in each case. The International Authority shall distribute these payments and contributions on the basis of equitable sharing criteria, taking into account the interests and needs of developing countries.</td>
<td><strong>4.</strong> The payments or contributions shall be made to the International Authority on terms and procedures to be agreed upon with the Authority in each case. The International Authority shall distribute these payments and contributions on the basis of equitable sharing criteria, taking into account the interests and needs of developing countries, particularly the least developed and the land-locked amongst them.</td>
<td><strong>4.</strong> 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 countries/States*, particularly the least developed and the land-locked amongst them.</td>
<td><strong>4.</strong> 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 countries/States*, particularly the least developed and the land-locked amongst them.</td>
</tr>
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</table>

*With ICNT Rev.2, the precise wording that would appear in the LOS Convention was adopted. The last change was substitution of 'state(s)' for 'country(ies)' in paragraphs 3 and 4.