Article 82 of UNCLOS: A Clear Outcome of the ‘Package Deal’ Approach of the Convention Negotiation

Frida M. Armas-Pfirter
University of Buenos Aires, Buenos Aires, Argentina

Introduction

Article 82 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS)\(^1\) is one of the new additions to the international law of the sea. Article 82, paragraph 1, provides, *inter alia*,

> 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.

Its implementation is not an easy task and raises many problems.\(^2\) But, seeing the glass as half full, we also need to acknowledge that there are some important elements that have already been defined, e.g., the rate and grace period of the payments and contributions, the institution through which the payments shall be made, and the basic criteria to distribute the funds collected.

This positive approach to the problem does not imply minimizing several complex issues whose resolution is still pending. Undoubtedly, it is necessary to solve them to provide greater certainty to the offshore industry and to the work of the International Seabed Authority (ISA). This essay briefly considers the origin and rationale of Article 82, but cannot attempt to solve all the problems. Rather it tries to provide useful elements for their solution and, in particular, it identifies various problems with respect to the three actors involved in implementation of Article 82: the coastal state, the ISA, and the beneficiary states.

---

\(^1\) Montego Bay, 10 December 1982, 1833 U.N.T.S. 3. The 1958 Geneva Convention (infra note 3) did not have a provision similar to Art. 82.

\(^2\) International Seabed Authority (ISA), *Issues Associated with the Implementation of Article 82 of the United Nations Convention on the Law of the Sea*, ISA Technical Study No. 4 (Kingston: ISA, 2009). This study was a revised version of a legal study prepared by Aldo Chircop for the ISA seminar that discussed this issue.
The Rights of Coastal States over the Continental Shelf and Article 82

As dealt with in Part VI of UNCLOS, the continental shelf, as a natural prolongation of the coastal state's land territory, comprises the seabed and subsoil of the submarine areas that extend beyond the territorial sea to the outer edge of the continental margin or to a distance of 200 nautical miles (M) from the baselines, where the outer edge of the continental margin does not extend up to that distance. The entitlement to the continental shelf has always been based on the right of the coastal state over the land, although its formulation has evolved. The 1958 Geneva Convention on the Continental Shelf linked the right of the coastal state over the continental shelf to ‘adjacency’, and ten years later, the International Court of Justice added the concept of ‘natural prolongation’ to that of adjacency:

the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist ipso facto and ab initio, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources.

Natural prolongation as a basis for rights over the continental shelf is set out in Article 76, paragraph 1 of UNCLOS, and is also considered customary international law. This right applies to the entire shelf as “there is in law only a single continental shelf rather than an inner continental shelf and a separate extended or outer continental shelf.”

---

3 Geneva, 29 April 1958, 499 U.N.T.S. 311 [1958 Geneva Convention], art. 1: “The term ‘continental shelf’ is used as referring (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 meters or, beyond that limit, to where the depth of the superjacent waters admits the exploitation of the natural resources of the said areas.”

4 North Sea Continental Shelf Cases, 1969 I.C.J. Reports, para. 19. See also F.M. Armas-Pfirter, “Working paper on Potential Options on Equitable Distribution of Payments and Contributions,” in ISA, Implementation of Article 82 of the United Nations Convention on the Law of the Sea, ISA Technical Study No. 12 (Kingston: ISA, 2013), Annex 6, 83–97, 83–88.

5 Arbitral Tribunal, Barbados v. Trinidad and Tobago, 2006, para. 213 in fine, 66. This statement by the Arbitral Tribunal has been, according to Shabtai Rosenne, “a useful and important clarification.” See S. Rosenne, “Arbitrations under Annex VII of the United Nations Convention on the Law of the Sea,” in Law of the Sea, Environmental Law, and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah, eds., T.M. Ndiaye and R. Wolfrum (Leiden: Brill
Article 77 further defines the rights of the coastal state over the shelf as exclusive, not dependent on occupation or an express proclamation.\(^6\) Despite this concept of single shelf, it is clear that the Article treats the exploitation of non-living resources differently whether within or beyond 200 M. This difference needs to be understood in the historical context of the decade of negotiations during the Third United Nations Conference on the Law of the Sea. When the Conference sessions began in 1973, the 1958 Geneva Convention was in force for more than fifty states and, therefore, the exclusive right of a coastal state over the resources of the continental shelf adjacent to its coast, up to 200 meters depth or up to where exploitation was feasible, was widely accepted. This reference to the possibility of exploitation to determine the limit made it indefinite and subject to technological advances. Bearing in mind that one of the driving forces of the Conference was the need to establish a new international legal regime (‘the Area’) for the seabed and its resources beyond national jurisdiction, the ‘common heritage of mankind’, it was necessary to clearly establish the limits to coastal states’ continental shelves.

A group of states, known as the broad-margin states or margineers,\(^8\) acted jointly with a clear goal: to consolidate their claim to rights over the shelf following the criterion of natural prolongation, without being constrained by the 200-M exclusive economic zone (EEZ).\(^9\) As a result of the negotiations, the concept of continental shelf as the natural prolongation of a coastal state’s territory was consecrated. Therefore, the continental shelf, whether it is inside or outside 200 M, is not part of the Area. But the margineers had to make some concessions:

– The outer limit of the continental shelf had to be determined according to the criteria and restrictions established in Article 76, with the intervention of the Commission on the Limits of the Continental Shelf.

– The coastal state has the obligation to make payments or contributions in kind, not exceeding 7 per cent, with respect to the exploitation of non-living resources beyond 200 M, and provided it is not a net importer of

\(^6\) 1958 Geneva Convention, \textit{supra} note 3, art. 2(2–3); UNCLOS \textit{supra} note 1, art. 77(2–3).

\(^7\) UNCLOS, id., Part XI. For a discussion of the regime of the Area and its importance, see other essays in this section of this volume.

\(^8\) Broad-margin states include Argentina, Australia, Canada, India, Ireland, New Zealand, Norway, the United States, and Uruguay.

\(^9\) See UNCLOS, \textit{supra} note 1, Part V.
the mineral resource produced. This concept arose as the only viable compromise for an extension of the continental shelf beyond 200 M. It was a quid pro quo in the ‘package deal’ approach adopted in the negotiation of the Convention. The final outcome was that the whole continental shelf and its resources are subject to the coastal states’ sovereign rights and they are separate from the Area and the ‘common heritage’ principle. Further, the exploitation of non-living resources is subject to a form of ‘servitude’, which is established in Part vi (continental shelf). In Part xi (the Area), it is only mentioned in relation to the powers of the ISA.

There are dissimilar conceptions of the essence of this rule, and consequently, the extent of the coastal state’s rights over the continental shelf beyond 200 M. According to one interpretation, the limit of the continental shelf beyond 200 M is an ‘encroachment’ on the Area, a sort of “transitional zone between the areas within the limits of national jurisdiction and the area beyond the limits of national jurisdiction.” For those who take this view, the payments and contributions of the coastal state are resources that are the common heritage of mankind and, as such, must be distributed by the ISA.

Others, on the contrary, focus on the fact that by definition, the natural prolongation of the state’s territory—the continental shelf—cannot be part of the Area, which is “the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.” For this reason, during the negotiation of UNCLOS, several of the marginate states maintained their opposition to the concept of ‘revenue sharing’ until the end, not only due to its economic aspect, but also because it implied establishing a dual regime for the continental shelf.

10 See D.H. Anderson, “The Status Under International Law of the Maritime Areas Around Svalbard,” Ocean Development & International Law 40 (2009): 373–384; T. Koivurova, “The Actions of the Arctic States Respecting the Continental Shelf: A Reflective Essay,” Ocean Development & International Law, 42, no. 3 (2011): 211–226, 215; T.L. McDorman, “The Continental Shelf Regime in the Law of the Sea Convention: A Reflection on the First Thirty Years,” The International Journal of Marine and Coastal Law 27 (2012): 743–751.

11 See A. Chircop, “Development of Guidelines for the Implementation of Article 82,” in ISA Technical Study No. 12, supra note 4, Annex 4, 35–68.

12 Cf. E.D. Brown, The International Law of the Sea, Volume 1, Introductory Manual (London: Dartmouth Publishing Company Limited, 1994), 262–263. See also R.R. Churchill and A.V. Lowe, The Law of the Sea, 3rd ed. (Manchester: Manchester University Press, 1999), 156–157.

13 Cf. A.L. Daverede, La plataforma continental—Los intereses argentinos en el nuevo derecho del mar (Buenos Aires: Editorial Universitaria de Buenos Aires, Colección Instituto del Servicio Exterior de la Nación 2, 1983), 89, 94–95; J.A. Yturriaga Barberan De, Ámbitos de Jurisdicción en la Convención de las Naciones Unidas sobre el Derecho del Mar (Madrid: Ministerio de Asuntos Exteriores, 1996), 280–281.
The concession of Article 82 is considered by this position as a result of the negotiation of all the issues as a ‘package deal’.14

Role of the International Seabed Authority in Relation to Article 82

As noted above, Article 82 provides the ISA with a limited, yet essential, role as the ‘channel’ through which payments and contributions go from the coastal state to the developing state beneficiaries.15 The ISA was established under UNCLOS as the autonomous body through which states parties “shall ... organize and control activities in the Area, particularly with a view to administering the resources of the Area.”16 According to UNCLOS and the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (1994 Agreement),17 the ISA’s functions are fulfilled by its three main organs, namely, the Assembly, the Council and the Secretariat, and by two subsidiary ones, the Legal and Technical Commission and the Finance Committee.18

The 1994 Agreement specifies the role that each organ of the ISA has in the distribution of benefits and development of the equitable sharing criteria. The Legal and Technical Commission is in charge of formulating and submitting to the Council the rules, regulations, and procedures related to the distribution of benefits, to keep them under review, and to recommend, from time to time, such amendments thereto as it may deem necessary or desirable.19

---

14 See, e.g., the US delegation’s report noting: “Revenue sharing for exploitation of the continental shelf beyond 200 M from the coast is part of a package that establishes with clarity and legal certainty the control of coastal States over the full extent of their geological continental margins.” Quoted by A. Roach and R. Smith, Excessive Maritime Claims, 3rd ed. (Leiden/Boston: Martinus Nijhoff, 2012), 192.
15 McDorman, supra note 10, 751. It is worth considering that during the negotiations, there were proposals to designate other UN bodies or regional economic organizations as recipients, so that contributions were not confused with the resources that are the common heritage of mankind.
16 UNCLOS, supra note 1, art. 157; Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December, 1982, 28 July 1994, 33 I.L.M. 1309 (1994) [1994 Agreement], Annex, s. 1.1.
17 1994 Agreement, id.
18 The Finance Committee was not established by UNCLOS but in the 1994 Agreement, with the task to oversee the financing and financial management of the Authority, and has a central role in the administration of the Authority’s financial and budgetary arrangements.
19 1994 Agreement, supra note 16, art. 165, para. 2 (a), (f) and (g).
In turn, the Council’s functions include, specifically, recommending to the Assembly rules, regulations, and procedures on the equitable sharing of the payments and contributions made by coastal states pursuant to Article 82.\textsuperscript{20} For its part, the Assembly has to consider and approve them.\textsuperscript{21}

The Finance Committee has a role regarding all activities that could have financial implications for the ISA. The 1994 Agreement establishes that the Assembly and the Council should consider its recommendations, as regards, among others, “rules, regulations and procedures on the equitable sharing of financial and other economic benefits derived from activities in the Area and the decisions to be made thereon.”\textsuperscript{22} Although the payments and contributions in Article 82 are not related to the ‘activities in the Area’, a recommendation by the Finance Committee might be worthwhile regarding the equitable sharing criteria. In any event, the importance of the ISA in the framework of Article 82 and the problems of fulfilling its mandate are undeniable. There is no doubt that the ISA must somehow provide for and have in place the means to be able to collect and distribute the payments and contributions, and to be able to organize the workload that this task will imply.

\section*{State Beneficiaries}

The beneficiaries of payments or contributions are the ‘states parties’ to UNCLOS. However, the payments or contributions are not going to be distributed evenly. Article 82, paragraph 4, establishes that this will be done “on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them.” The list of least developed countries is reviewed every three years by the United Nations Economic and Social Council, and there are currently 47 states on the list.\textsuperscript{23} The land-locked states, which were, to a great

\begin{footnotesize}
\begin{itemize}
\item[20] Id., art. 162, para. 2(o) and (i). These recommendations need to be adopted by consensus, in accordance with Article 161, paragraph 8(d): “Decisions on questions of substance arising under the following provisions shall be taken by consensus: Article 162, paragraph 2 (m) and (o).”
\item[21] Id., Article 160, paragraph 2 (f), (i), and subparagraph (g), also grants the Assembly the power “to decide upon the equitable sharing of financial and other economic benefits derived from activities in the Area,” but it must be borne in mind that the funds of Article 82 are not benefits derived from activities in the Area.
\item[22] Id., Annex, s. 9(7). See also Rule 11 (f) of the Rules of Procedure of the Finance Committee.
\item[23] See “LDC List,” United Nations, Department of Economic and Social Affairs (June 2017), https://www.un.org/development/desa/dpad/least-developed-country-category/ldcs-at-a-glance.html.
\end{itemize}
\end{footnotesize}
extent, the driving force behind the adoption of Article 82, must also be privileged. Some states have both characteristics and others have only one of the two. These and other considerations show that Article 82, paragraph 4, opens many options for the implementation of payments and contributions.24

**Conclusion**

It is clear that the need to operationalize Article 82 is becoming increasingly pressing in the face of the technological advances making it possible to exploit hydrocarbons at greater depths. The media has already referred to a real possibility that Canada may be the first country to make payments and contributions, and also to the demand made by companies for a clear regulation on the manner in which that international obligation will affect royalties.25

In addition, a good working relationship with the states parties to UNCLOS is essential for the work of the ISA, as the implementation of Article 82 will have consequences in its functioning and the costs involved. It is also necessary for the ISA to develop the equitable sharing criteria in advance, to avoid problems when the time comes, and to provide for the necessary infrastructure or personnel requirements. But UNCLOS carefully avoided including powers either of the ISA or other states that may restrain coastal states when complying with the obligation imposed by Article 82, even though Article 82 must be fulfilled in good faith as with all the other obligations set forth in the Convention.26 Compliance with Article 82 may potentially be subject to the dispute settlement procedures in the Convention, however, and this poses a number of challenges.27

---

24 See a detailed analysis of the beneficiaries and criteria in Armas-Pfirter, *supra* note 4.
25 Canada has a number of offshore licenses in the continental shelf beyond 200 M. See, among others, W. Spicer, “Canada, the Law of the Sea Treaty and International Payments: Where Will the Money Come From?” The School of Public Policy, University of Calgary, SPP Research Papers, 8, no. 31 (September 2015), https://www.policyschool.ca/wp-content/uploads/2016/03/final-law-sea-spicer.pdf.
26 UNCLOS, *supra* note 1, art. 300.
27 As noted in ISA, *supra* note 2, at 67, “The challenges associated with the resolution of Article 82 disputes highlight the need for close cooperation between the concerned OCS States and the Authority to resolve differences before they degenerate into disputes.”
There have been proposals for an agreement or guidelines in the workshops organized by the ISA and in its published papers. But not much progress has been made thus far. Perhaps an option to move faster without generating resistance among coastal states would be to encourage negotiations among states in relation to implementation of Article 82. These negotiations may take place, although not exclusively, within the ISA’s sphere, but avoiding granting the organization the role of control over the coastal states’ activity.

At the same time, the ISA is not precluded from moving forward specifically in the tasks assigned indisputably to it by UNCLOS, that is, defining the equitable sharing criteria that best take into account the interests and needs of developing states, particularly the least developed and land-locked among them, and analyzing the options of administrative, accounting, and personnel organization that it may deem necessary to receive and distribute the payments.

28 Several have already been referred to, see Technical Study No. 4, supra note 2; No. 5: "Non-living Resources of the Continental Shelf Beyond 200 Nautical Miles: Speculations on the Implementation of Article 82 of the United Nations Convention on the Law of the Sea" (2010); No. 12, supra note 4; No. 15: “A Study of Key Terms in Article 82 of the Nations Convention on the Law of the Sea” (2016).