

The International Seabed Authority and the Common Heritage of Mankind: The Need for States to Establish the Outer Limits of their Continental Shelf

Erik Franckx*

Research Professor, President, Department of International and European Law
Director, Centre for International Law, Vrije Universiteit Brussel, Pleinlaan 2,
B-1050 Brussels, Belgium

Abstract

The principle of the common heritage of mankind was introduced in international law to internationalize certain common spaces beyond national jurisdiction. It has found a certain application in outer space as well as in the Antarctic, but it is with respect to the oceans that it has so far found its fullest exposition. Since the principle is very much tied to the Area in the United Nations Convention on the Law of the Sea, *i.e.*, the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction, it can be said to have triggered that convention, but at the same time was also almost responsible for its demise. As a consequence, its content has changed over the years. The present article intends to have a closer look at how this principle at present relates to the obligation of broad-margin states to establish the outer limit of their continental shelf.

Keywords

law of the sea; the Area; common heritage of mankind; delineation of maritime zones

Introduction

The title of the present article indicates that three separate issues need to be addressed, to wit: the International Seabed Authority (hereinafter ISA; addressed in the third part of this article), the common heritage of mankind

* Prof. Dr. Erik Franckx (Erik.Franckx@vub.ac.be) has, moreover, teaching assignments (in chronological order) at the Vesalius College (*V.U.B.*), *Université Libre de Bruxelles*, the Brussels School of International Studies (University of Kent at Canterbury), the Program on International Legal Cooperation (Institute of European Studies, *V.U.B.*), and the *Université Paris-Sorbonne Abu Dhabi*. He has been appointed by Belgium as: a member of the Permanent Court of Arbitration, The Hague, The Netherlands; as an expert in marine scientific research for use in special arbitration under the 1982 United Nations Convention on the Law of the

(addressed in the second part), and the need for States to establish the outer limits of their continental shelf (addressed in the fourth part). Since the ISA was established exactly in order to give concrete content to the principle of the common heritage of mankind (hereinafter the common heritage principle or the principle), it seems logical to consider this principle first. In the conclusions set out in the fifth and final part, a summary will be given of the present-day situation, and some possible ways forward will be suggested.

The Common Heritage of Mankind

The common heritage principle was conceived for the internationalization of common spaces outside national jurisdiction.¹ Three such areas normally enter the picture if one tries to focus on the concrete application of this principle, namely the Antarctic, outer space, and the deep seabed.² However, this concept is not applied in a uniform manner in all of these areas. It will suffice to compare the 1959 Antarctic Treaty,³ which does not even mention the common heritage principle in its founding document,⁴ the so-called Moon

Sea; as a legal expert in the Advisory Body of Experts of the Law of the Sea of the Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization; and as an expert in maritime boundary delimitation to the International Hydrographic Organization. This article was initially prepared as a paper for a colloquium held in Kuala Lumpur, Malaysia, on 10–11 May 2010, entitled “The Outer Limits of the Continental Shelf and Considerations of Submissions”. The author greatly appreciates having received permission from the organizers to publish this paper outside the conference proceedings. The present article is an amended version of that contribution.

¹ For an authoritative exposition, see R. Wolfrum, *Die Internationalisierung staatsfreier Räume: die Entwicklung einer internationalen Verwaltung für Antarktis, Weltraum, Hohe See und Meeresboden* (Berlin, Springer, 1984), 757 pp.

² See for instance M.N. Shaw, *International Law* (Cambridge, Cambridge University Press, 2008) at 533, or J. Frakes, “The Common Heritage of Mankind Principle and the Deep Seabed, Outer Space, and Antarctica: Will Developed and Developing Nations Reach a Compromise?” (2003) 21 *Wisconsin International Law Journal* 409–434. Wolfrum adds the high seas in his enumeration in order to address areas like marine pollution or fisheries. Here, however, the author recognizes that certain tendencies towards internationalization can be discovered even though the use of the seas is not subjected to the application of the common heritage principle. Wolfrum, *op. cit.*, *supra* note 1, at 650 and 652 respectively.

³ Antarctic Treaty, opened for signature 1 December 1961, entry into force 23 June 1961; 402 *United Nations Treaty Series* (hereinafter *UNTS*) 71, 72–84 (also available at: <www.ats.aq/documents/ats/treaty_original.pdf>).

⁴ Only by means of recommendations did the Antarctic Treaty Consultative Parties apply this principle to the mineral resources to be found there. But see the Protocol on Environmental Protection to the Antarctic Treaty, opened for signature 4 October 1991, entry into force 14 January 1998; 30 *ILM* 1461 (also available at: <www.ats.aq/documents/recatt/Att006_e>).

Treaty of 1979, which does mention the principle⁵ but leaves the establishment of an international regime for later,⁶ and the 1982 United Nations Convention on the Law of the Sea, which does both,⁷ to understand that the given enumeration follows a crescendo pattern, not only in time, but also in the robustness of the regime so established.⁸ It is thus with respect to the 1982 Convention that the common heritage principle has found its fullest exposition so far.

Within the framework of the law of the sea, the introduction of the common heritage principle has been characterized by many ups and downs. The ups are rather more to be found in the field of theory, the downs, by contrast, are found in the area of practical implementation. One may indeed not forget that, at the time of its introduction, the principle stood at right angles with the sacrosanct principle of the freedom of the seas which had governed the oceans ever since Grotius had won the “battle of the books” in the 17th century.⁹ Or, as stated by one author right after the adoption of the 1982 Convention:

pdf>). See especially Arts. 7 and 25, making it clear that all activities relating to mineral resources are prohibited at present, with the exception of scientific research activities.

⁵ Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, opened for signature 5 December 1979, entry into force 11 July 1984; 1363 *UNTS* 3, 22–28 (also available at: <www.unoosa.org/oosa/en/SpaceLaw/gares/html/gares_34_0068.html>). Art. 11(1) states: “The moon and its natural resources are the common heritage of mankind, ...”.

⁶ *Id.*, Art. 11(1), which continues by referring specifically to paragraph 5 of the same Article in this respect. This paragraph reads: “States Parties to this Agreement hereby undertake to establish an international regime, including appropriate procedures, to govern the exploitation of the natural resources of the moon as such exploitation is about to become feasible”. Thus it is necessary to await the effective mineral exploitation of outer space for the common heritage principle to be clarified in this area, as stressed by W. Scholtz, “Common Heritage: Saving the Environment for Humankind or Exploiting Resources in the Name of Eco-Imperialism” (2008) 41 *Comparative and International Law Journal of Southern Africa* 273–293, at 281.

⁷ United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, entry into force 16 November 1994; 1833 *UNTS* 397–581 (also available at: <www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf>); hereinafter 1982 Convention. See specifically Art. 136, stating the principle that “[t]he Area and its resources are the common heritage of mankind”, and Arts. 137–149, further elaborating the principles applicable to the Area, as well as the rest of Part IX establishing the concrete international regime applicable.

⁸ For as stressed in J. Salmon (ed.), *Dictionnaire de droit international public* (Brussels, Bruylant, 2001) at 810: “Le contenu précis de ce régime est celui qui résulte des traités l’instituant”. Comparing the three systems in this respect, see for instance M.V. White, “The Common Heritage of Mankind: An Assessment” (1982) 14 *Case Western Reserve Journal of International Law* 509–542, at 541–542.

⁹ K. Gustafson Juras, J.E. Noyes and E. Franckx, *The Law of the Sea in a Nutshell* (St. Paul, MN, West Publishing Company, 2010) at 1.

While the principle of the freedom of the seas continues the traditional battle with its ancient adversary [the principle of coastal sovereignty] in these offshore zones, it now finds that it is also under attack right in the heart of its empire by a new pretender whose objective is to establish the fundamental principle that the seabed beyond the limits of national jurisdiction and the resources thereof are the common heritage of mankind.¹⁰

The mere introduction of this principle with respect to the deep seabed in a legally binding instrument is therefore no minor feat when viewed from an international legal perspective. Moreover, the 1982 Convention even bestows a special level of protection on the common heritage principle. First of all, although the specific review conference provided for in Article 155 of the 1982 Convention did not survive the overhaul of the system in 1994, its paragraph 2, which provides that any possible review is obliged “to ensure the maintenance of the principle of the common heritage of mankind”,¹¹ was nevertheless retained under the new system.¹² This should not really come as a surprise, because the conflict clauses contained in the 1982 Convention¹³ specifically provide that “no amendments to the basic principle relating to the common heritage of mankind set forth in article 136” will be tolerated.¹⁴ States Parties to the 1982 Convention are moreover obliged to refrain from becoming a party to any agreement in derogation thereof.¹⁵ This was the closest the founding fathers of the 1982 Convention could come to the wish of some states to simply declare that the common heritage of mankind formed part of *jus cogens*.¹⁶ If one of the weak points of the latter notion is the lack of

¹⁰ E.D. Brown, “Freedom of the High Seas *versus* the Common Heritage of Mankind: Fundamental Principles in Conflict” (1982) 20 *San Diego Law Review* 521–560, at 522.

¹¹ 1982 Convention, *op. cit.*, *supra* note 7, Art. 155(2).

¹² Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, opened for signature 28 July 1994, entry into force 28 July 1996; 1836 *UNTS* 41–179 (also available at: <daccess-dds-ny.un.org/doc/UNDOC/GEN/N94/332/98/PDF/N9433298.pdf?OpenElement>); hereinafter 1994 Implementation Agreement. See Annex, Section 4.

¹³ These clauses were not influenced by the adoption of the 1994 Implementation Agreement.

¹⁴ 1982 Convention, *op. cit.*, *supra* note 7, Art. 311(6).

¹⁵ *Id.*

¹⁶ See the Chilean proposal of 1979 (Informal mimeographed document (F/14) by Chile of 20 August 1979, reproduced in R. Platzöder (ed.), *The Law of the Sea: Documents*, Vol. XII (New York, Oceana, Dobbs Ferry, 1990) at 390), resubmitted in 1980 (Informal mimeographed document (GP/9) by Chile of 5 August 1980, reproduced in *id.*, at 302). These two proposals are identical and read as follows: “The State Parties to the present Convention accept and recognize on behalf of the international community as a whole that the provision relating to the common heritage of mankind set out in article 136 is a peremptory norm of general international law from which no derogation is permitted and which, consequently, can be modified only by a subsequent norm of general international law having the same character”. For these proposals to become acceptable, it proved necessary to delete the explicit reference

clear content,¹⁷ this problem would simply have been amplified by the incorporation of the common heritage principle, which itself has some very diverse meanings.¹⁸ Indeed, based on one and the same principle, some authors have argued that unilateral extraction of deep seabed minerals outside of the conventional system is simply illegal. Others, by contrast, have argued that such actions are in accordance with international law, as long as some of the benefits derived from the exploitation are shared with others.¹⁹ Despite this ambiguity as to its exact content,²⁰ the Canadian delegate therefore was probably right when he stated, towards the end of the long negotiations leading up to the adoption of the 1982 Convention, that the common heritage of mankind was “quite possibly the greatest of any principle or ideal which will emerge from this Conference”.²¹

to *jus cogens* and the language to be found in Art. 53 of the Convention on Law of Treaties, opened for signature 22 May 1969, entry into force 27 January 1980; 1155 UNTS 331, 332–353 (also available at: <untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf>). For the manner in which this compromise was finally reached, see Report of the President on the Work of the Informal Plenary Meeting of the Conference on General Provisions, 22 August 1980 (UN Doc. A/CONF.62/L.58), as reprinted in Third United Nations Conference on the Law of the Sea, Official Records, Vol. 14 (United Nations, New York, 1982) at 128, 129. See also Anon, “Article 311”, in: M.H. Nordquist, S. Rosenne and L.B. Sohn (eds.), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Vol. 5 (Dordrecht, Martinus Nijhoff, 1989) 229–243, at 241–242. Some authors have questioned the purpose of Art. 311(6) as it now reads, and one has even labelled it “the butchered remains” of the failed drive to give the common heritage principle the status of *jus cogens*. E.D. Brown, *Sea-bed Energy and Minerals: The International Legal Regime*, Vol. 2 (Dordrecht, Nijhoff, 2001) at 58.

¹⁷ See for instance R. Wallace and O. Martin-Ortega, *International Law* (London, Sweet & Maxwell, 2009) at 35, who state: “There is, as might be anticipated, considerable uncertainty and indeed controversy as to the scope and extent of *jus cogens*”.

¹⁸ The concept has been labeled “interpretively prismatic and metaphysical”, being “the result of accretion of a number of concepts, hence the term ‘macro-concept’ and implications of metaphysicality and spirituality beyond any logical extreme”. See C. Hislop, “Two Challenges to the Creation of Non-Jurisdictional Marine Protected Areas: Freedom of the High Seas Doctrine and the Common Heritage of Mankind Principle”, in: C. Hislop, G. New and P. Bender (eds.), *Protecting the Antarctic and Southern Ocean* (Hobart, University of Tasmania Law School Press, 2004) at 1, 12 and 18 respectively.

¹⁹ For a good overview article, see L.F. Goldie, “A Note on Some Diverse Meanings of ‘the Common Heritage of Mankind’” (1983) 10 *Syracuse Journal of International Law and Commerce* 69–112.

²⁰ See N. Matz-Lück, “The Concept of the Common Heritage of Mankind: Its Viability as a Management Tool for Deep-sea Genetic Resources”, in: A.G. Oude Elferink and E.J. Moleenaar (eds.), *The International Legal Regime of Areas Beyond National Jurisdiction: Current and Future Developments* (Leiden, Nijhoff, 2010) 61–75, at 65, who describes the common heritage of mankind as being “more an underlying philosophy but does not give indications concerning the formal or substantive contents of a legal regime in a general sense”.

²¹ Statement by the Canadian Ambassador, Mr. A. Beesley, Third United Nations Conference

On the down side, it has to be noted that the practical implementation of this novel principle in practice tended to end up on a rather slippery slope. Starting from Ambassador Arvid Pardo's speech before the General Assembly of the United Nations in 1967,²² one should keep in mind that only about half of his ideas on the subject found their way into the 1982 Convention.²³ A quick reading of the end result of this codification effort could easily lead to the conclusion that far-reaching progressive development of international law had been attained in this particular domain. But in order to further analyze this aspect, one has to turn to the international organization specifically established to realize the common heritage principle, namely the ISA.

The International Seabed Authority

If one reads the relevant articles of the 1982 Convention relating to the ISA in a cursory manner, one could easily end up with an embellished view on the practical realization of the common heritage principle. Starting from the premise that all rights in the mineral resources of the deep ocean floor "are vested in mankind as a whole, on whose behalf the [ISA] shall act",²⁴ it is easily understood that the exact mode of functioning of this organization will be of crucial importance in order to give concrete content to the common heritage principle. Such a cursory reading could easily lead to the impression that one is confronted here with a very "democratic" international organization. The reasoning is as follows.

The ISA, which has an extensive competence,²⁵ is composed of three principal organs, namely an Assembly, a Council and a Secretariat.²⁶ When turn-

on the Law of the Sea (hereinafter UNCLOS III), Plenary Meetings, 130th Meeting, 28 July 1980.

²² Speech by the Maltese Ambassador, Mr. A. Pardo, to the United Nations on 1 November 1967, 22nd session of the General Assembly (First Committee, 1515th meeting) (available at: <www.un.org/Depts/los/convention_agreements/texts/pardo_ga1967.pdf>).

²³ L.B. Sohn, "Managing the Law of the Sea: Ambassador Pardo's Forgotten Second Idea", in: J.I. Charney and D.K. Anton (eds.), *Politics, Values and Functions: International Law in the 21st Century: Essays in Honor of Professor Louis Henkin* (The Hague, Nijhoff, 1997) at 275–293. Sohn argues that only Pardo's ideas with respect to the seabed found their way into the 1982 Convention, but that his idea about the internationalization of the superjacent waters was never taken up by the negotiators during UNCLOS III.

²⁴ 1982 Convention, *op. cit.*, *supra* note 7, Art. 137(2).

²⁵ *Id.*, Art. 157(2). Besides the powers expressly conferred on the ISA, the latter has, as stated in this Article, "such incidental powers, consistent with the Convention, as are implicit in and necessary for the exercise of those powers and functions with respect to activities in the Area".

²⁶ *Id.*, Art. 158(1).

ing to the powers of these different organs, it is immediately noticed that the Assembly, which consists of all the members of the ISA,²⁷ is said to be “considered the supreme organ”, to which the other two principal organs are accountable.²⁸ All members in the Assembly have one vote²⁹ and voting takes place by either a simple³⁰ or qualified majority.³¹ The Council, on the other hand, is said to be the executive organ³² and has a limited membership.³³ All members have one vote here as well,³⁴ but voting can take place in many different ways: by a simple, two-thirds, or three-fourths majority, or by consensus.³⁵ The Secretariat, finally, gives administrative support to the other organs of the ISA, *i.e.*, to principal as well as to subsidiary organs.³⁶

When read together, these provisions could easily reflect the ultimate dream of any developing state. A combination of the fact that *primo*, the organization possesses a broad competence and *secundo*, that the centre of that organization is located in the Assembly, where every state has one vote, could theoretically provide unlimited powers to the third-world countries on the sole condition that they stick together.³⁷ However, when the different, often opposing forces are analyzed in some detail, one ends up with a totally different understanding of the ultimate compromise formula in Articles 156 to 170.³⁸ This can be illustrated by the following typical example: that the

²⁷ *Id.*, Art. 159(1). The ISA itself consists of all State Parties to the 1982 Convention. *Id.*, Art. 156(2).

²⁸ *Id.*, Art. 160(1).

²⁹ *Id.*, Art. 159(6).

³⁰ *Id.*, Art. 159(7), concerning questions of procedure.

³¹ *Id.*, Art. 159(8), concerning questions of substance.

³² *Id.*, Art. 162(1).

³³ *Id.*, Art. 161(1), namely 36 members.

³⁴ *Id.*, Art. 161(7).

³⁵ *Id.*, Art. 161(8).

³⁶ *Id.*, Art. 166(3).

³⁷ In this respect it is noteworthy to stress that the so-called Group of 77 displayed a marked single policy with respect to the deep seabed regime. This contrasted sharply with the individual positions taken by the members of this group in other matters. See B.H. Oxman, “The Third United Nations Conference on the Law of the Sea: The 1976 New York Sessions”, (1977) 71 *American Journal of International Law* 247–269, at 251. Since 26 July 1974, for instance, all members of the Group of 77 refrained from making further individual proposals on the issue of the deep seabed and all consistently supported the common proposal of the group instead. K.W. Schoonover, “The History of Negotiations Concerning the System of Exploitation of the International Seabed” (1977) 9 *International Journal of International Law and Politics* 483–514, at 494.

³⁸ These conclusions are based on a much more detailed analysis conducted by the present author elsewhere. See E. Franckx, “Een nieuwe internationale organisatie : de Zeebodemautoriteit” (A New International Organization: The Seabed Authority), in: P. De Vroede (ed.), *Technologie en recht* (Antwerp, Kluwer Rechtswetenschappen, 1987) 11–57, at 16–40.

Assembly is said to “be *considered* the supreme organ”³⁹ is in fact a watered-down version of an earlier text simply stating that the Assembly was the supreme organ. But since the Group of 77 did not want to change the words “supreme organ”, this compromise was finally arrived at.⁴⁰ The extensive powers of that body⁴¹ moreover have to be exercised “in conformity with the relevant provisions of this Convention”,⁴² which then creates many inroads. A similar remark in fact applies to the ISA as a whole. Despite the *prima facie* broad competence of this newly created international organization,⁴³ a more careful and impartial reading of Part XI leads to the conclusion, as stated by one author, that the ISA might have broad competence, but in fact has few powers.⁴⁴

The 1994 Implementation Agreement,⁴⁵ which “radically revised” Part XI of the 1982 Convention⁴⁶ in order to accommodate some basic concerns of the United States and some other Western states possessing the technology to mine the deep seabed,⁴⁷ only further accentuates this tendency.⁴⁸

³⁹ See *supra* note 28; emphasis supplied.

⁴⁰ B.H. Oxman, “The Third United Nations Conference on the Law of the Sea: The Eighth Session (1979)”, (1979) 74 *American Journal of International Law* 1–41, at 15.

⁴¹ 1982 Convention, *op. cit.*, *supra* note 7, Art. 160.

⁴² *Id.*, Art. 160(1).

⁴³ As mentioned *supra* note 25 and accompanying text.

⁴⁴ F.H. Paolillo, “Institutional Arrangements”, in: R.-J. Dupuy and D. Vignes (eds.), *A Handbook on the New Law of the Sea* (Dordrecht, Martinus Nijhoff, 1991) 689–819, at 696. See also more generally at 695–698, where the author sustains the proposition that one has to pierce the veil when reading these Articles.

⁴⁵ The use of the word “implementation” in the title of this agreement has been described as “a fig leaf that covers the evident reality that in 1994 the LOS Convention was amended and several aspects of the original concept of common heritage of mankind were substantively changed”. T. Scovazzi, “The Seabed Beyond the Limits of National Jurisdiction: General and Institutional Aspects”, in: Oude Elferink and Molenaar, *op. cit.*, *supra* note 20, 43–60, at 47.

⁴⁶ M.C. Wood, “International Seabed Authority (ISA)”, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law Online* (Oxford, Oxford University Press, 2009) at 2.

⁴⁷ B.H. Oxman, “The 1994 Agreement and the Convention”, (1994) 88 *American Journal of International Law* 687–696, at 696. All these concerns were taken care of. See J.-P. Lévy, “Les bons offices du secrétariat général des Nations Unies en faveur de l’universalité de la Convention sur le droit de la mer” (1994) 98 *Revue Générale de Droit International Public* 871–898, at 895. Or, as stated in less diplomatic terms by R.P. Anand, “Common Heritage of Mankind: Mutilation of an Ideal” (1997) 37 *Indian Journal of International Law* 1–18, at 16, who, after having discussed the 1994 Implementation Agreement, entitles the next heading simply: “The United States Gets All It Wanted”.

⁴⁸ The principle itself was not seriously questioned during the negotiations leading up to the 1994 Implementation Agreement. D. Anderson, *Modern Law of the Sea: Selected Essays* (Leiden, Nijhoff, 2008) at 352. But despite the fact that the preamble to the 1994 Agreement still reconfirms in its second paragraph that “the seabed and ocean floor and subsoil thereof, beyond

The ISA is still in its infancy, since mineral exploitation of the deep seabed is yet to start. Nonetheless, this organization will be responsible for the distribution of payments or contributions with respect to the exploitation of non-living resources of the continental shelf beyond 200 nautical miles⁴⁹ from the baseline.⁵⁰ As stated by its former Secretary-General, this organization has already started to play a catalytic role in fostering international cooperation aimed at resource development in the deep seabed for the benefit of mankind as a whole.⁵¹

the limits of national jurisdiction (hereinafter referred to as ‘the Area’), as well as the resources of the Area, are the common heritage of mankind”, some claim that this is mere lip-service paid to the common heritage principle since its operational clauses and Annex in fact destroy its substance. See V.-D. Degan, “The Common Heritage of Mankind in the Present Law of the Sea”, in: N. Ando, E. McWhinney and R. Wolfrum (eds.), *Liber Amicorum Judge Shigeru Oda* (The Hague, Kluwer Law International, 2002) 1363–1376, at 1374. Or as stated by J. Brunnée, “Common Areas, Common Heritage, and Common Concern”, in: D. Bodansky, J. Brunnée and E. Hey (eds.), *The Oxford Handbook of International Environmental Law* (Oxford, Oxford University Press, 2007) 550–573, at 563: “One may ask what remains of the idea that the seabed and its resources are the common heritage of mankind, notwithstanding its reaffirmation in the [1994 Implementation A]greement”. See also the conclusion by U. van Zyl, “The ‘Common Heritage of Mankind’ and the 1982 Law of the Sea Convention: Principle, Pain or Panacea?” (1993) 26 *Comparative and International Law Journal of Southern Africa* 49–66, at 63, arguing that the principle evolved from being associated with the idea of equitable distribution into one of greed. Arguing along the same lines, see Anand, *op. cit.*, *supra* note 47, at 17–18. But see, nevertheless, K. Baslar, *The Concept of the Common Heritage of Mankind in International Law* (The Hague, Nijhoff, 1998) at 218–219, who emphasizes that all sections of the Annex to the 1994 Implementation Agreement presuppose the application of the basic principle of Part XI, as stated in the preamble to that agreement, *i.e.*, the common heritage principle.

⁴⁹ Hereinafter nm.

⁵⁰ 1982 Convention, *op. cit.*, *supra* note 7, Art. 82(4). This was stressed by M.W. Lodge, “The International Seabed Authority—Its Future Directions”, in: M.H. Nordquist, J.N. Moore and T.H. Heidar (eds.), *Legal and Scientific Aspects of Continental Shelf Limits* (Leiden, Nijhoff, 2004) 403–409, as well as by the same author, “The International Seabed Authority and Article 82 of the UN Convention on the Law of the Sea” (2006) 21 *International Journal of Marine and Coastal Law* 323–333, at 325 and 333, indicating that this will probably be the first kind of benefits that will accrue to mankind as a whole. But even in this hypothesis, the lack of clear outer limits of the extended continental shelves at present will constitute a constraining factor for the application of Art. 82 as a whole. See for instance G. Mingay, “Article 82 of the LOS Convention—Revenue Sharing—the Mining Industry’s Perspective” (2006) 21 *International Journal of Marine and Coastal Law* 335–346, at 340, implying that the delimitation of the outer continental shelves is a precondition to the application of Art. 82. Moreover, the United States is of the view that this Article does not bind states not parties to the 1982 Convention. Gustafson Juras *et al.*, *op. cit.*, *supra* note 9, at 321.

⁵¹ S. Nandan, “Administering the Mineral Resources of the Deep Seabed”, in: D. Freestone, R. Barnes and D. Ong (eds.), *The Law of the Sea: Progress and Prospects* (Oxford, Oxford University Press, 2006) 75–92, at 92.

Before moving to the next issue, it is appropriate to draw some preliminary conclusions from the analysis conducted so far. It cannot be disputed that a new concept has taken firm root in international law. The common heritage of mankind, as demonstrated above, is at present firmly anchored in the 1982 Convention. At the same time, as stated by one author, “there are many disputed issues in relation to the nuts and bolts of the concept”.⁵² It seems therefore safe to conclude that the general principle of the common heritage of mankind can be considered at present as forming part and parcel of customary international law. The same is not necessarily true with respect to the specific legal obligations ensuing from this principle in governing the actual utilization of the deep seabed.⁵³

The Need for States to Establish the Outer Limits of their Continental Shelf

Prior to this section, the article has used the general terminology of deep seabed as the field of application of the principle of the common heritage of mankind. It is now time to try to give some more concrete substance to this term. This might seem an easy job, because the definitions listed in Article 1 of the 1982 Convention specifically address this particular issue. Indeed, the very first definition listed here states that the “Area” means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction”.⁵⁴ This is a negative definition, or, as labelled by some, an *a contrario* definition,⁵⁵ for in order to know the exact extent of the Area, one needs to know up to where exactly coastal states have extended their national jurisdiction at sea. A negative definition is not a totally exceptional method relied upon in the law of the sea when defining maritime zones, for the high seas have also been defined in a similar manner in the 1982 Convention:

⁵² E. Holmila, “Common Heritage of Mankind in the Law of the Sea” (2005) 1 *Acta Societatis Martensis* 187–205, at 189.

⁵³ R. Wolfrum, “Common Heritage of Mankind”, in: R. Bernhardt (ed.), *Encyclopedia of Public International Law* (Amsterdam, North Holland, 1999) 692–695, at 694.

⁵⁴ 1982 Convention, *op. cit.*, *supra* note 7, Art. 1(1)(1).

⁵⁵ J.-P. Lévy, “The International Sea-Bed Area”, in: Dupuy and Vignes, *op. cit.*, *supra* note 44, 589–819, at 590. By this the author means that the Area “comprises so much of the sea-bed, ocean floor and subsoil as is excluded from national jurisdiction . . . It is the limits placed on the extent of national jurisdiction . . . which will determine the outer boundaries of the Area” (*id.*, at 590–591).

The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.⁵⁶

Here too, one needs to know the exclusive economic zone (EEZ) claims of the separate states, the breadth of the territorial sea established by those states not claiming an EEZ, as well as the exact location of their baselines, whether normal, straight, or archipelagic in nature, before it can be ascertained with any precision where exactly the regime of the high seas applies.

There is however a major difference between these two examples, namely that in order to be able to ascertain the field of application of the legal regime of the high seas, the superjacent waters are the determining factor, whereas with respect to the Area, one needs to rely on the concept of the continental shelf. Or, as stated by one author:

By referring to the ‘seabed and ocean floor and subsoil thereof’ Art. 1(1) UN Convention on the Law of the Sea clarifies that the outer limit of the continental shelf constitutes the decisive criterion with regard to the extension of the Area.⁵⁷

And it is here that additional complexity is added to the definition of the field of application of the Area when compared with that of the high seas. For where the maximal extension of the EEZ is rather easy to ascertain, *i.e.*, 200 nm,⁵⁸ such an exercise is much more complicated with respect to the continental shelf, especially in the hypothesis that the outer edge of the continental margin does extend beyond 200 nm.⁵⁹

The high seas have so far been able to stand the test of time, especially when viewed from the perspective that the EEZ concept has up till now been able to contain the creeping jurisdiction of coastal states beyond 200 nm with respect to the superjacent waters.⁶⁰ But with respect to the Area, the situation is a lot more complex, as will be demonstrated below. The crucial question to be answered here is: who protects the common heritage of mankind? If with

⁵⁶ 1982 Convention, *op. cit.*, *supra* note 7, Art. 86.

⁵⁷ W.G. Vitzthum, “International Seabed Area”, in: Wolfrum (ed.), *op. cit.*, *supra* note 46 at 2.

⁵⁸ 1982 Convention, *op. cit.*, *supra* note 7, Art. 57.

⁵⁹ *Id.*, Art. 76. For a diagram illustrating the complexity of the Article, see Gustafson Juras *et al.*, *op. cit.*, *supra* note 9, at 308. The other side of the coin is probably that, once established, the outer limits of the Area will be more stable in nature than the outer limits of the high seas. Compare 1982 Convention, *op. cit.*, *supra* note 7, Art. 76(8), indicating that the establishment of the outer limits of the continental shelf “shall be final and binding”, with Arts. 5 and 7 of that same instrument, being much more flexible in this respect.

⁶⁰ E. Franckx, “The 200-mile Limit: Between Creeping Jurisdiction and Creeping Common Heritage?” (2005) 48 *German Yearbook of International Law* 117–149.

respect to the protection of the freedom of the seas, the seafaring states have so far always been able to claim a direct interest in the negation of such freedoms by others,⁶¹ this might not necessarily be so with respect to the Area. The protection of community interests is usually entrusted to non-state actors representing the interests of society as a whole.⁶² With respect to the Area, the ISA has received the competence to act on behalf of mankind as a whole.⁶³ This organization not only controls and coordinates the activities of states in the Area,⁶⁴ but also makes sure that, through the Enterprise,⁶⁵ all States may participate in the exploration and exploitation of its resources.⁶⁶ As will be seen, however, the ISA is ill-equipped to deal with issues of coastal state jurisdiction creeping towards the Area.

Coastal states will consequently need to determine the outer edge of the continental margin extending beyond 200 nm first, in accordance with Article 76 of the 1982 Convention, before mankind as a whole will be able to know with any certainty what the spatial limits are within which the principle of the common heritage of mankind applies.⁶⁷ This article will concentrate on two specific elements in this respect. First, the element of time will be addressed, and more particularly the question of how long states have to determine the outer limits of their continental margins extending beyond 200 nm. Second, the element of non-encroachment will be examined. Here the safeguards that exist to make sure that coastal states do not encroach on the Area when establishing these outer limits will be scrutinized.

The Element of Time

The element of time, simply put, concerns the fact that mankind as a whole cannot wait *ad aeternam* to know what these limits are. Especially when taking into account the checkered history of the common heritage concept described above in combination with the present-day distribution of forces,

⁶¹ As illustrated by works such as the one by J.A. Roach and R.W. Smith, *United States Responses to Excessive Maritime Claims* (The Hague, Nijhoff, 1996), 676 pp., listing instances where this state has protested against what it considers to be excessive claims made by other states.

⁶² I. Feichtner, “Community Interest”, in: Wolfrum (ed.), *op. cit.*, *supra* note 46 at 5.

⁶³ See *supra* note 24 and accompanying text.

⁶⁴ Wolfrum, *op. cit.*, *supra* note 1, at 359.

⁶⁵ The Enterprise is the organ of the ISA that is supposed to carry out activities in the Area directly. 1982 Convention, *op. cit.*, *supra* note 7, Art. 170(1).

⁶⁶ Wolfrum, *op. cit.*, *supra* note 1, at 512–513.

⁶⁷ This was stressed by A. de Marffy Mantuano, “La Commission des limites du plateau continental: cette mal connue”, in: *Le plateau continental dans ses rapports avec la zone économique exclusive: symposium international de Meknès* (Paris, Pédone, 2006) 131–143, at 143.

the submission seems reasonable that the longer this boundary remains in a state of flux, the higher the chances are that such a situation will become detrimental to the interests of mankind.

In order to tackle this problem, the 1982 Convention provides that states have a ten-year deadline, after the entry into force of this instrument, to introduce their submissions to the Commission on the Limits of the Continental Shelf.⁶⁸ This first deadline, however, proved to be impracticable, for many states were having great difficulties in finding the necessary human and financial resources to act accordingly. The States Parties to the 1982 Convention therefore decided in 2001 to use another starting point to determine this deadline, namely the date of adoption by the CLCS of its Scientific and Technical Guidelines.⁶⁹ But even this additional delay of about five years proved insufficient for many states. In June 2008, therefore, the States Parties to the 1982 Convention decided that a state could satisfy the new 2009 deadline by simply, *primo*, filing preliminary information indicative of the outer limits of the continental shelf beyond 200 nm and, *secundo*, describing the status of preparation and intended date of submission of supporting data.⁷⁰ This leaves a rather wide discretion in the hands of the coastal states making use of this possibility. Expected dates have been extended by states up to 2011,⁷¹ and it is far from certain that these limits will not be extended beyond that point in time because of the lenient language used by the 2008 decision of the Meeting of the States Parties in this respect.⁷²

It can be concluded therefore that, from a fixed deadline on paper, the States Parties to the 1982 Convention have moved to a rather flexible one in practice,⁷³ which leaves ample discretion to the coastal states when selecting

⁶⁸ 1982 Convention, *op. cit.*, *supra* note 7, Annex II, Art. 4; hereinafter CLCS. Taking into account the date of entry into force of the 1982 Convention, see *supra* note 7, this means that for all states for which the 1982 Convention had entered into force before that date, 2004 became the critical year in this respect.

⁶⁹ Doc. SPLOS/72 of 29 May 2001, available at: <ods-dds-ny.un.org/doc/UNDOC/GEN/N01/387/64/PDF/N0138764.pdf?OpenElement>. With respect to all states for which the 1982 Convention had entered into force before 13 May 1999, 12 May 2009 became the new deadline.

⁷⁰ Doc. SPLOS/183 of 20 June 2008, available at: <ods-dds-ny.un.org/doc/UNDOC/GEN/N08/398/76/PDF/N0839876.pdf?OpenElement>.

⁷¹ Doc. SPLOS/INF/20 of 16 January 2008, available at: <ods-dds-ny.un.org/doc/UNDOC/GEN/N08/209/61/PDF/N0820961.pdf?OpenElement>. See the example of Madagascar.

⁷² See *supra* note 70 and accompanying text. It is rather left to the coastal states to set this date at their discretion.

⁷³ B. Kunoy, "Disputed Areas and the 10-Year Time Frame: A Legal Lacuna?" (2010) 41 *Ocean Development and International Law* 112–130, at 115, distinguishing between the "black letter" of the ten-year period, and the "pragmatic understandings" regarding its starting date.

the date of final submission of the supporting data.⁷⁴ But this ten-year deadline notwithstanding,⁷⁵ it should not be forgotten that even if states act in time, it is not the CLCS that establishes the outer limit of the continental shelf. This remains a prerogative of the coastal state. But in order to be able to do so, the delineation of the coastal state shall be “based on” the recommendations of the CLCS.⁷⁶ This results in a legalistic carousel if the coastal state does not agree with the recommendations of the CLCS, for its only option is then to resubmit new information in order to obtain a more favourable recommendation. If not, however, the circle starts all over again, and as stated by one author: “Theoretically, this process could go on and on indefinitely”.⁷⁷ The only timeframe provided here is that in case of disagreement, the coastal state has to resubmit in “a reasonable time”,⁷⁸ leaving once again ample leeway for the coastal states.⁷⁹

The Element of Non-encroachment

The second element, namely how to make sure that coastal states do not encroach upon the province allocated by the 1982 Convention to mankind as a whole, will be treated next. In principle this should not be too difficult, since the 1982 Convention created three institutions with a specific competence in the area, namely, the ISA, the CLCS and the Seabed Chamber of the International Tribunal for the Law of the Sea.⁸⁰ Finally, since the common heritage principle is involved, this article will look into the question whether individ-

⁷⁴ The specific issue of disputed areas will be considered *infra*. The submissions by the coastal state should also be clearly distinguished from their consideration by the CLCS. As a result, *inter alia*, of the large number of submissions during the weeks preceding the May 2009 deadline, the current projections of the CLCS are that its work will continue until 2030 for it to consider all submissions. See Presentation on the Workload of the Commission on the Limits of the Continental Shelf (CLCS) by its Chairman, Alexandre Tagore Medeiros de Albuquerque, during the 20th Meeting of the States Parties, 14–18 June 2010, at 8, available at: <www.un.org/Depts/los/clcs_new/workload/clcs_presentation_workload2010msp20.pdf>.

⁷⁵ Some have even argued that nothing would prevent the States Parties from abolishing the ten-year deadline if necessary. See E. Jarmache, “A propos de la Commission des limites du plateau continental” (2007) 11 *Annuaire du Droit de la Mer* 51–68, at 63.

⁷⁶ 1982 Convention, *op. cit.*, *supra* note 7, Art. 76(8).

⁷⁷ R.W. Smith, “The Continental Shelf Commission”, in: M.H. Nordquist and J.N. Moore (eds.), *Oceans Policy: New Institutions* (The Hague, Martinus Nijhoff, 1999) 135–140, at 139.

⁷⁸ 1982 Convention, *op. cit.*, *supra* note 7, Annex II, Art. 8.

⁷⁹ See R. Haworth, “The Continental Shelf Commission”, in: Nordquist and Moore, *op. cit.*, *supra* note 77, 147–154, at 153–154, urging the CLCS to give guidance in this respect and to decide on a termination point concerning this legalistic carousel.

⁸⁰ Hereinafter Seabed Chamber. 1982 Convention, *op. cit.*, *supra* note 7, Annex VI, Arts. 35–40.

ual states have a right under contemporary international law to act in the name of mankind in order to make sure that coastal states do not encroach on the spatial extent of the Area.

The International Seabed Authority

The ISA, as stated above, has received the competence to act on behalf of mankind as a whole.⁸¹ It thus, in principle, represents mankind.⁸² It should therefore not only be an organization characterized by the broadest possible participation of States,⁸³ but should moreover also represent people living outside the context of present-day states, as well as future generations.⁸⁴ The ISA can thus at most be an administering agent, certainly not the embodiment of mankind.⁸⁵

Moreover, the 1982 Convention does not give the ISA any specific right⁸⁶ either to participate in the determination of the outer boundary of the Area, or the outer limits of the continental shelf beyond 200 nm, which represent two sides of one and the same coin.⁸⁷ It also has no role to play in the deliberations of the CLCS.⁸⁸ The ISA consequently has no role to play in the

⁸¹ See *supra* notes 24 and 63 as well as accompanying texts.

⁸² Paolillo, *op. cit.*, *supra* note 44, at 704.

⁸³ *Id.* But see Wood, *op. cit.*, *supra* note 46, at 4, who points to the recurring problem of the poor attendance at the Assembly's meetings.

⁸⁴ Paolillo, *op. cit.*, *supra* note 44, at 705. Stressing this particular point, see also C.C. Joyner, "Legal Implications of the Concept of the Common Heritage of Mankind" (1986) 35 *International and Comparative Law Quarterly* 190–199, at 195.

⁸⁵ R.-J. Dupuy, "The Area as the Common Heritage of Mankind", in: Dupuy and Vignes, *op. cit.*, *supra* note 44, 579–586, at 583.

⁸⁶ See L.D. Nelson, "The Continental Shelf: Interplay of Law and Science", in: Ando *et al.*, *op. cit.*, *supra* note 48, 1235–1253, at 1250, who states: "The drafters of the Convention did not give the Authority any right to participate in the determination of the common boundary between the international seabed area and the outer limit of the continental shelf". See also the many further references given at the end of that statement by this author in note 51. Nelson already made similar comments in an earlier article of his. See by the same author, "Claims to the Continental Shelf Beyond the 200-mile Limit", in: V. Götz, P. Selmer and R. Wolfrum (eds.), *Liber amicorum Günther Jaenicke: zum 85. Geburtstag* (Berlin, Springer, 1998) 573–588, at 575 (and further references in note 9).

⁸⁷ As stated in an explanatory note attached to a *note verbale* of 21 May 2009 from the Permanent Mission of China to the United Nations addressed to the Secretary-General (Proposal for the Inclusion of a Supplementary Item in the Agenda of the Nineteenth Meeting of the States Parties: "Therefore, to determine the outer limits of the extended continental shelf is at the same time to clarify the scope of the Area, which is of great importance to the overall interests of the international community in the Area". Doc. SPLOS/196, available at: <ods-dds-ny.un.org/doc/UNDOC/GEN/N09/346/61/PDF/N0934661.pdf?OpenElement>. Hereinafter Chinese *note verbale*. On this issue, see also *supra* note 55 and accompanying text.

⁸⁸ R. Wolfrum, "The Role of International Dispute Settlement Institutions in the Delimitation

determination of the outer limit of the continental shelf,⁸⁹ despite the fact that some authors believe this might have been a sensible thing to do.⁹⁰ As stressed by its conceptual father after the conclusion of the protracted negotiations in 1982, the ISA can only wait passively until the coastal state is willing to act,⁹¹ at which time, according to the 1982 Convention, the Secretary-General of the ISA shall receive a copy of the charts or lists of geographical coordinates.⁹²

This state of affairs, where, on the one hand, one has to deal with a merely “inchoate” principle in need of further development,⁹³ which at best has received so far a mixed reception in contemporary international law,⁹⁴ while, on the other hand, one is confronted with an international organization that can only act as an administering agent with an undetermined constituency and no specific powers in this respect but that is supposed to protect it,⁹⁵ does not bode well if one is looking for a counterweight against possible coastal state incursions into the Area.

The Commission on the Limits of the Continental Shelf

The CLCS seems to be the natural ally of the common heritage of mankind, for it is generally admitted that this body was created to act as a watchdog

of the Outer Continental Shelf”, in: R. Lagoni and D. Vignes (eds.), *Maritime Delimitation* (Leiden, Nijhoff, 2006) 19–31, at 24. Since the ISA is there to act on behalf of mankind as a whole, he describes this state of affairs as “hardly convincing” (*id.*). In the same sense, see Jarmache, *op. cit.*, *supra* note 75, at 56.

⁸⁹ Lodge (2004), *op. cit.*, *supra* note 50, at 403.

⁹⁰ J.E. Noyes, “Judicial and Arbitral Proceedings and the Outer Limits of the Continental Shelf” (2009) 42 *Vanderbilt Journal of Transnational Law* 1211–1264, at 1239.

⁹¹ A. Pardo, “The Convention on the Law of the Sea: A Preliminary Appraisal” (1982) 20 *San Diego Law Review* 489–503, at 499 note 42, where the author dwells on other aspects of the passivity imposed upon the ISA: it cannot question the limits once submitted, it cannot trigger the coastal state to act in this respect, it may not establish provisional boundaries if none are forthcoming. . . . In the same sense, see E. Jarmache, “La pratique de la Commission des limites du plateau continental” (2008) 54 *Annuaire Français de Droit International* 429–441, at 441, who states: “On est en droit de s’étonner, ou de s’interroger, sur la quasi absence de l’AIFM dans un processus de transfert de territoires et de ressources de l’humanité vers des Etats sans y être associée”.

⁹² 1982 Convention, *op. cit.*, *supra* note 7, Art. 84(2).

⁹³ As worded by E. Guntrip, “The Common Heritage of Mankind: An Adequate Regime for Managing the Deep Seabed?” (2003) 4 *Melbourne Journal of International Law* 376–405, at 404.

⁹⁴ B. Simma, “Foreword”, in: N.J. Schrijver and F. Weiss (eds.), *International Law and Sustainable Development: Principles and Practice* (Leiden, Nijhoff, 2004) at v–vi.

⁹⁵ As stated by S. Karagiannis, “Observations sur la Commission des limites du plateau continental” (1994) 8 *Espaces et Ressources Maritimes* 163–194, at 192: “Dès lors, il devient impossible pour l’Autorité de protéger les frontières du patrimoine commun de l’humanité qu’elle gère pourtant à titre exclusif”.

against excessive outer continental shelf claims by coastal states.⁹⁶ It thus offers protection to the common heritage of mankind against the expansionist tendencies of coastal states.⁹⁷ It might therefore be somewhat surprising to find that this body does not have any jurists amongst its members.⁹⁸ This has been explained by the argument that the CLCS was clearly not meant to be a court,⁹⁹ but rather a “legitimator”.¹⁰⁰ As a consequence the function of the CLCS has been described as that of “the canary in a mine shaft”¹⁰¹ or “*caution morale*”.¹⁰²

The CLCS has moreover not been granted any powers to participate in compulsory procedures entailing binding decisions according to Part XV, Section 2 of the 1982 Convention. The issue of such powers was certainly raised during the negotiations in the third UN Conference on the Law of the Sea (UNCLOS III), but apparently no follow-up action was undertaken.¹⁰³ As

⁹⁶ See for instance R.R. Gardiner, “Reasons and Methods for Fixing the Outer Limit of the Continental Shelf Beyond 200 Nautical Miles” (1978) 11–12 *Revue Iranienne des Relations Internationales* 145–170, at 161; or T.L. McDorman, “A Note on the Commission on the Limits of the Continental Shelf and the Submission of the Russian Federation”, in: D.D. Caron and H.N. Scheiber (eds.), *Bringing New Law to Ocean Waters* (Leiden, Martinus Nijhoff, 2004) 467–481, at 474.

⁹⁷ E. Beigzadeh, “La Commission des limites du plateau continental” (2000) 5 *Annuaire du Droit de la Mer* 71–92, at 72 and 92; and Karagiannis, *op. cit.*, *supra* note 95, at 176 and 178–194, calling the mission of the CLCS that of a “gardien du temple” and developing the last part of his article on the missions of the CLCS under the heading: “La mission de sauvegarde du patrimoine commun de l’humanité”.

⁹⁸ 1982 Convention, *op. cit.*, *supra* note 7, Annex II, Art. 2(1).

⁹⁹ B.H. Oxman, “The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)”, (1981) 75 *American Journal of International Law* 211–256, at 230. But see Karagiannis, *op. cit.*, *supra* note 95, at 166–167, assimilating this Commission to a judicial body. These arguments have, however, cogently been refuted by A. de Marffy Mantuano, “La fixation des dernières limites maritimes: le rôle de la Commission des limites du plateau continental” in: V. Coussirat-Coustère, Y. Daudet, P.-M. Dupuy, P.M. Eisemann and M. Voelckel (eds.), *La mer et son droit: mélanges offerts à Laurent Lucchini et Jean-Pierre Quéneudec* (Paris, Pédone, 2003) 399–419, at 403.

¹⁰⁰ McDorman, *op. cit.*, *supra* note 96, at 472, clarifies this notion by stating: “Legitimation is not the same thing as legal or political approval. Moreover, legitimation must be understood not in terms of black-and-white (legitimate or illegitimate) but as a spectrum between greater legitimacy and lesser legitimacy. The calculation by a state of whether the establishment of a continental margin outer limit by another state is legitimate and whether a protest will or will not be issued by a non-claiming state involves law and politics. The state parties to the LOS Convention have not surrendered or delegated this calculation to the commission” ..., *id.*, at 417–418).

¹⁰¹ *Id.*, at 474.

¹⁰² de Marffy Mantuano, *op. cit.*, *supra* note 99, at 410.

¹⁰³ Nelson (2002), *op. cit.*, *supra* note 86, at 1239; Nelson (1998), *op. cit.*, *supra* note 86, at 579; Noyes, *op. cit.*, *supra* note 90, at 1238.

concluded by Dolliver Nelson in this respect, “there is something unfinished about the Commission”.¹⁰⁴

This article will not look into the position that the CLCS has taken with respect to submissions by states when a land or maritime dispute exists between them. Other sessions of a colloquium held in Kuala Lumpur, Malaysia, on 10–11 May 2010, entitled “The Outer Limits of the Continental Shelf and Considerations of Submissions”, dealt with this specific issue. Nevertheless, in view of the arguments developed here, it seems appropriate to dwell on at least one point. If it is correct that the CLCS will adopt a low threshold for establishing the presence of a dispute in the sense of Annex I, adopted by this body in 1988,¹⁰⁵ this will most probably result in further delays for achieving a final boundary between the outer limits of the continental shelf beyond 200 nm and the Area.¹⁰⁶

The Seabed Chamber of the International Tribunal for the Law of the Sea

Within the International Tribunal for the Law of the Sea a special Seabed Chamber has been established.¹⁰⁷ This Seabed Chamber has been given jurisdiction to hear disputes between a State Party and the ISA, *inter alia*, for acts or omissions by a State alleged to be in violation of Part XI.¹⁰⁸ Even though a number of authors have suggested that, hypothetically, the ISA could bring a case alleging that a coastal state has encroached, by its acts or omissions, on the Area,¹⁰⁹ others have seriously doubted whether the Seabed Chamber would

¹⁰⁴ L.D. Nelson, “The Settlement of Disputes Arising From Conflicting Outer Continental Shelf Claims”, (2009) 24 *International Journal of Marine and Coastal Law* 409–422, at 418. The author mentions one of the Evensen drafts on the continental shelf wherein it was indicated that the possible appeal procedures of the Commission and its relationship with the proposed dispute settlement procedures remained to be discussed. See also Wolfrum, *op. cit.*, *supra* note 88, at 25, who labels this a flaw in the procedure.

¹⁰⁵ As suggested by A.G. Oude Elferink, “Submissions of Coastal States to the CLCS in Cases of Unresolved Land or Maritime Disputes”, in: M.H. Nordquist, J.N. Moore and T.H. Heidar (eds.), *Legal and Scientific Aspects of Continental Shelf Limits* (Leiden, Nijhoff, 2004) 263–285, at 266.

¹⁰⁶ As discussed *supra*. For present purposes it will not make a real difference to make a keen distinction between “submission” and “consideration of a submission” (see Kunoy, *op. cit.*, *supra* note 73, at 121), leading to the conclusion that at present the ten-year time limit still stands (*id.*, at 125–126), for the fact remains that the coastal state will under such circumstances not be able to make a final delineation of the whole of the outer boundary of its continental shelf beyond 200 nm.

¹⁰⁷ See *supra* note 80.

¹⁰⁸ 1982 Convention, *op. cit.*, *supra* note 7, Art. 187(b)(i).

¹⁰⁹ See for instance A. Boyle, “Dispute Settlement and the Law of the Sea Convention: Prob-

ever consider having jurisdiction in such cases, either on procedural,¹¹⁰ more substantive,¹¹¹ or even political grounds.¹¹²

If not in contentious cases, could the Seabed Chamber perhaps become involved in such matters through its advisory competence?¹¹³ Once again, the fact that jurisdiction of the ISA is linked to activities in the Area, makes it unlikely that such boundary questions could fall under the advisory competence of the Seabed Chamber.¹¹⁴ But the advisory, and thus non-binding legal character of such a Seabed Chamber opinion could eventually make it a more realistic option after all.¹¹⁵

Individual States

Compliance often turns out to be a sore point in international law. With respect to the obligation to protect community interests, the degree of complexity increases exponentially, for the question arises whether other parties to a treaty all possess an individual right of performance against a country not living up to its treaty obligations to protect community interests (or in the case of customary international law, any other state *tout court*), or does only the collective possess such a right of performance?¹¹⁶

lems of Fragmentation and Jurisdiction" (1997) 46 *International and Comparative Law Quarterly* 37–54, at 46 note 23.

¹¹⁰ Noyes, *op. cit.*, *supra* note 90, at 1240, referring to the fact that the *chapeau* of Art. 187(b) (i) limits such cases to "activities in the area".

¹¹¹ Note that the ISA has no competence with respect to the determination of the boundary between the outer edge of the continental margin extending beyond 200 nm and the Area; see *supra*.

¹¹² As stated by Noyes, *op. cit.*, *supra* note 90, at 1240, the voting requirements within the ISA, coupled with the reluctance of states to have their determination of the outer edge of the continental margin extending beyond 200 nm contested by an international organization, will probably make it highly unlikely for the ISA to ever undertake such action.

¹¹³ 1982 Convention, *op. cit.*, *supra* note 7, Art 191. As suggested by T. Treves, "Remarks on Submissions to the Commission on the Limits of the Continental Shelf in Response to Judge Marotta's Report" (2006) 21 *International Journal of Marine and Coastal Law* 363–367, at 365.

¹¹⁴ Nelson, *op. cit.*, *supra* note 104 at 417; Nelson (1998), *op. cit.*, *supra* note 86, at 577; Wolfrum, *op. cit.*, *supra* note 88, at 28–29; Noyes, *op. cit.*, *supra* note 90, at 1256–1257. The latter author adds other reasons already raised with respect to a possible contentious procedure before this body.

¹¹⁵ Noyes, *op. cit.*, *supra* note 90, at 1258.

¹¹⁶ Feichtner, *op. cit.*, *supra* note 62, at 7, indicating that the answer is not to be found in the Law of Treaties, but rather in the Law of State Responsibility (*id.*, at 7–8). Pointing to the fact that the latter issue deserves further exploration, without however advocating it himself, see Treves, *op. cit.*, *supra* note 113, at 365. See also J.R. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge,

In the present context, where the protection of the common heritage of mankind in the Area is at stake, two questions arise: first, if a state establishes the outer limit of its continental shelf in accordance with the recommendations of the CLCS, the nature of the process does not appear to allow much room for judicial review in such cases,¹¹⁷ unless, perhaps, if the recommendations by the CLCS themselves were invalid.¹¹⁸ Second, on the other hand, if a state establishes the outer limit of its continental shelf without basing itself on the recommendations of the CLCS, nothing seems to prevent a state, whose rights are directly affected by such a claim, from contesting the validity of such a claim before one of the judicial bodies listed in Article 287 of the 1982 Convention.¹¹⁹ The question becomes more difficult if the state wanting to file a court case is not directly affected by such an action, but claims to act in the name of mankind as a whole. After giving an overview of relevant case law relating to *actio popularis* actions, Judge Nelson comes to the conclusion that such an action is probably difficult under present-day international law for states not directly involved.¹²⁰ The ideal body to do so would be the ISA, but as noted above, this is not an option at present.¹²¹

Conclusions

The determination of the outer edge of the continental margin extending beyond 200 nm, and thus indirectly the limits of application of the common heritage principle in the Area, remains basically a coastal state competence, which the participants in the UNCLOS III negotiations apparently did not want to share with any of the bodies they established within the framework of the 1982 Convention. Even during the hey-day of the common heritage prin-

Cambridge University Press, 2002) at 276–280, where the commentary on Art. 48 certainly does not mention the common heritage principle as a possible field of application.

¹¹⁷ Nelson, *op. cit.*, *supra* note 104, at 418–419.

¹¹⁸ International Law Association, Report of the Committee on Legal Issues of the Outer Continental Shelf, Berlin Conference (2004), at 12; available at: <www.ila-hq.org/download.cfm/docid/B5A51216-8125-4A4B-ABA5D2CAD1CF4E98>.

¹¹⁹ Nelson, *op. cit.*, *supra* note 104, at 419; Noyes, *op. cit.*, *supra* note 90, at 1247.

¹²⁰ Nelson, *id.*, at 420–421. Reaching the same conclusion, see Noyes, *id.*, at 1258. In the same sense, see M. Ragazzi, *The Concept of International Obligations "Erga Omnes"* (Oxford, Clarendon Press, 1997) at 210–214. But see for instance M.A. Namountougou, "La commission des limites du plateau continental: problèmes de statut juridique et attributions", (2008) 41 *Belgian Review of International Law* 292–330, at 328–329, as well as Wolfrum, *op. cit.*, *supra* note 88, at 29–31. The latter author is nevertheless uncertain whether courts and tribunals will allow for such action (*id.*, at 31).

¹²¹ See *supra*.

ciple nobody appeared willing to restrict in any way the power of the coastal state to determine the outer edge of its competence at sea.¹²²

This leaves the international community ill-equipped to protect the common heritage of mankind, even in the location where this principle found its fullest exposition, namely the deep seabed.¹²³ With the existence of an *actio popularis* being highly uncertain in this area,¹²⁴ and the possible acceptance by the international community of individual countermeasures in this respect being even more remote at present,¹²⁵ it is to be regretted that the body supposed to act on behalf of mankind of a whole, *i.e.*, the ISA, did not receive the competence necessary to institute legal proceedings on its behalf.¹²⁶ This might probably be a more realistic proposition than asking for the ISA to be the competent body to negotiate the boundaries of the Area directly with the coastal states.¹²⁷

Under these circumstances the proposal by China for inclusion of an additional agenda item during the 2009 meeting of the States Parties to the 1982 Convention should not pass unnoticed. In fact, China appeals to the Meeting of the Parties to protect the Area against the unjustified encroachment of coastal states¹²⁸ by stating that:

¹²² G. de Lacharrière, “La réforme du droit de la mer et le rôle de la conférence des Nations Unies”, in: D. Bardonnet and M. Virally (eds.), *Le nouveau droit international de la mer* (Paris, Pédone, 1983) 1–33, at 16.

¹²³ There is indeed no common power to defend the common heritage, as remarked by R.C. Ogley, *Internationalizing the Seabed* (Brookfield, VT, Gower, 1984) at 47.

¹²⁴ In this respect it is interesting to note that even within the internal procedures of the CLCS, this kind of action has not been tolerated. As stated by Jarmache, *op. cit.*, *supra* note 91, at 440: “La CLPC a tenu, de manière cohérente, avec tout le processus d’examen des demandes d’extension à ne pas ouvrir la voie à une forme d’action populaire dans les observations ou objections recevables vis-à-vis d’une demande. Ne sont admises que les interventions d’Etats qui ont un intérêt à faire valoir”.

¹²⁵ Feichtner, *op. cit.*, *supra* note 62, at 7–9. In the same sense, see also the conclusions reached in this respect by C. Dominicé, “A la recherche des droits *erga omnes*” in: O. Corten, E. David and P. Klein (eds.), *Mélanges offerts à Jean Salmon. Droit du pouvoir, pouvoir du droit* (Brussels, Bruylant, 2007) 357–371, at 371.

¹²⁶ Nelson, *op. cit.*, *supra* note 104, at 421; by the same author (2002) and (1998), *op. cit.*, *supra* note 86, at 1251 and at 576 and 582, respectively.

¹²⁷ V.M. Rangel, “Settlement of Disputes Relating to the Delimitation of the Outer Continental Shelf: The Role of International Courts and Arbitral Tribunals” (2006) 21 *International Journal of Marine and Coastal Law* 347–362, at 359–360.

¹²⁸ *In casu* it concerns a state claiming an extended continental shelf starting from an isolated rock in the ocean which, according to China, cannot sustain human habitation or economic life of its own and therefore should not be able to generate a continental shelf of its own according to Art. 121(3) of the 1982 Convention.

in submissions concerning the outer limits of the continental shelf, the coastal States should comply fully with the Convention, taking into account the overall interests of the international community, and should not interpret the Convention in a biased way, nor put their own interests above the overall interests of the international community, nor encroach upon the Area as the common heritage of mankind.¹²⁹

This state, as a consequence, proposes:

to discuss how to strengthen the protection of the Area as the common heritage of mankind. In this regard, some appropriate guidelines are needed for the work of the international bodies established under the Convention.¹³⁰

However, this point was postponed by the Meeting of the Parties to the 1982 Convention in June 2009.¹³¹

China proposed to do the same at the beginning of the 15th Session of the ISA, which was held a few weeks afterwards, but it did not press the matter as there appeared to be little support from other Council members for inclusion of such a point in the official agenda. Instead, Professor Jia Yu, Deputy Director of the China Institute for Marine Affairs and Under-Secretary-General of the Chinese Society for International Law, was allowed to make a presentation during a briefing session for members and observers attending the ISA session, entitled “Safeguarding the Common Heritage of Mankind”.¹³² She warned that excessive continental shelf claims “would reduce the scope of the Area and its resources which were the common heritage of mankind”.¹³³ After Japan had labelled the Chinese presentation to be of a “political nature”, the Chinese Head of Delegation, Ambassador Chen Jinghua, “endorsed the assertion that safeguarding the common heritage of mankind was the joint responsibility of the members of the International Seabed Authority”.¹³⁴

¹²⁹ Chinese *note verbale*, *op. cit.*, *supra* note 87, Annex.

¹³⁰ *Id.*

¹³¹ Doc. SPLOS/203 of 24 July 2009, available at: <ods-dds-ny.un.org/doc/UNDOC/GEN/N09/424/12/PDF/N0942412.pdf?OpenElement>.

¹³² IAS, Press Release SB/15/10 of 2 June 2009, at 3, as available at: <<http://www.isa.org.jm/files/documents/EN/Press/Press09/SB-15-10.pdf>>. In fact, this wording was to be found on the last slide of the presentation used by Professor Jia Yu, and was followed there by the words “our common responsibilities”. The real title of that presentation was much more to the point: “The Rock of Oki-no-Tori Shall Have No EEZ and Continental Shelf”. Copies of this presentation were distributed at the time of that briefing session.

¹³³ *Id.*

¹³⁴ *Id.*, at 4. See also the *note verbale* of 8 July 2010 from the Permanent Mission of Indonesia to the United Nations Secretary-General, available at: <http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/idn_2010re_mys_vnm_e.pdf>. This *note verbale*

Coming from a state that has declared that it finds the common heritage principle “meaningless”¹³⁵ or constituting a mere “neologism”¹³⁶ during its introduction in the domain of the law of the sea, it might be appropriate to qualify this statement somewhat. As stated by the Belgian delegate during that same 1970 session, his state had always recognized that principle, but he used the following metaphor to dwell on the fact that its content remained vague:

Just as children named Constance or Prudence need not necessarily be constant or prudent in their behaviour, unless their parents see to it, the heritage of the seabed and ocean floor can only be common to the extent that the international community ensures that the resources of that heritage, and the heritage itself, are not subjected to competitive and anarchic appropriation by everyone, but are rather used, explored and exploited for the good of all, with the participation of all.¹³⁷

But the use of metaphors has of course an inherent danger, for the analogy uses one concept to apply in a totally different context. By introducing in the law of the sea the common heritage principle, which is a metaphor itself, rule-making was very much affected by this inconsistency, for even if the principle were vague enough to be acceptable to all, the main difficulty has proved to be the elaboration of a concrete plan of implementation. After having been constructed so diligently for over 25 years in order to give this principle concrete

focused on the substantial argument developed by China, namely that rocks which cannot sustain human habitation or economic life of their own, do not generate an EEZ or a continental shelf. Like a boomerang this Chinese argumentation was returned by Indonesia to undercut similar Chinese claims in the South China Sea, based on a map that this country had attached to counter the joint Malaysian and Vietnamese submission to the CLCS in the Southern South China Sea (*note verbale* of 7 May 2009 from the Permanent Mission of China to the United Nations Secretary-General; attached map, available at: <http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf>), as well as that of Vietnam in the North Area (*note verbale* of 7 May 2009 from the Permanent Mission of China to the United Nations Secretary-General, attached map, available at: <http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf>).

¹³⁵ D.P. O’Connell and I.A. Shearer, *The International Law of the Sea*, Vol. 1, (Oxford, Clarendon Press, 1982) at 464, note 89, referring to a statement made during the debates in the Seabed Committee in 1970.

¹³⁶ Anand, *op. cit.*, *supra* note 47, at 3.

¹³⁷ Statement made by the Belgian delegate during the 1788th meeting of the First Commission of the General Assembly during its twenty-fifth session in 1970 when it discussed the report of the Seabed Committee, para. 56, as reprinted in United Nations, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, *The Law of the Sea: Concept of the Common Heritage of Mankind: Legislative History of Articles 133 to 150 and 311(6) of the United Nations Convention on the Law of the Sea* (New York, United Nations, 1996) at 186.

content, it was to a large extent deconstructed again with the adoption of the 1994 Implementation Agreement.¹³⁸

At present, given the general weak status of the common heritage principle in general,¹³⁹ and particularly of mankind as a whole, to defend the outer limits of the Area, as demonstrated above, it is suggested that States Parties to the 1982 Convention should seize every opportunity to prevent the further erosion of what remains of the principle. It is not the tragedy of the commons,¹⁴⁰ but the tragedy of the Common Heritage of Mankind that could otherwise one day start to loom on the horizon.¹⁴¹ If “creeping common heritage”, as referred to by the present author elsewhere,¹⁴² therefore still seems to be an

¹³⁸ M.C. Pinto, “Common Heritage of Mankind: From Metaphor to Myth, and the Consequences of Constructive Ambiguity”, in: J. Makarczyk and K.J. Skubiszewski (eds.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (The Hague, Kluwer Law International, 1996) 249–268, at 265, stating that the efforts of the Secretary-General of the United Nations leading up to the adoption of the 1994 Implementation Agreement “resulted [in] the suppression of large sections of part XI, indeed those very sections that had been the subject of the most protracted and complex negotiations in the first place. Thus, it had taken a quarter of a century and countless millions in various currencies from the budget of the United Nations and, equally importantly, from all of the budgets of participating States, to determine by near-consensus the legal content of the ‘common heritage’, only to have that legal content radically altered in the two years that followed”. See in this respect also *supra* note 48.

¹³⁹ By the turn of the century, the development of the principle had reached a complete standstill, according to N.J. Schrijver, “De Teloorgang van het Gemeenschappelijk Erfgoed der Mensheid” (The Downfall of the Common Heritage of Mankind), (1999) 48 *Ars Aequi* 405–412, at 411–412. This has to be explained by the fact that by that time it reflected the spirit of another historic period (*id.*, at 412), or what in German is called “Zeitgeist”. See R. Wolfrum, “The Principle of the Common Heritage of Mankind” (1983) 43 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 312–337, at 312. Instead of the aspirations for a New International Economic Order, prevalent during the 1960s–1970s, the New World Order took over at the end of last century, very much influencing the concrete content of the principle. See S. Mahmoudi, “Common Heritage of Mankind, Common Concern of Humanity”, in: J.-P. Beurier, A. Kiss and S. Mahmoudi (eds.), *New Technologies and Law of the Marine Environment* (The Hague, Kluwer Law International, 2000) 215–223, at 217–218. The New World Order refers in the first place to the dissolution of the former Soviet Union. It is interesting to note, for instance, how Russian jurists started to plead for the abandonment of the rigid managerial structures and adapt them to the new economic and political realities. See for instance L.B. Imnadze, “Common Heritage of Mankind: A Concept of Cooperation in Our Interdependent World?” *The Law of the Sea in the 1990s: A Framework for Further International Cooperation: Proceedings of the Twenty-fourth Annual Conference of the Law of the Sea Institute*, Vol. 24, (1992), 312–318, at 315–316.

¹⁴⁰ This notion, it should be remembered, triggered the emergence of the common heritage principle. See *supra* note 1 and accompanying text.

¹⁴¹ S.J. Shackelford, “The Tragedy of the Common Heritage of Mankind” (2009) 28 *Stanford Environmental Law Journal* 109–169.

¹⁴² Franckx, *op. cit.*, *supra* note 60, at 146–147.

irrealis under present-day circumstances, creeping jurisdiction not aimed against the high seas, but against the Area this time, is a phenomenon that has to be qualified as a *potentialis* at present, if Greek grammatical notions were to be applied to it.