

## Expert Opinion

### An International Law Appraisal of the Executive Order 'Unleashing America's Offshore Critical Minerals and Resources'

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On 24 April 2025, the White House adopted an Executive Order to 'accelerate the responsible development of seabed mineral resources.'<sup>2</sup> Several states around the world have already considered the exploration of deep seabed minerals in areas within their jurisdiction, namely their continental shelves.<sup>3</sup> The Executive Order however aims to also regulate the granting of exploration and exploitation permits in areas beyond the U.S. national jurisdiction. The last point has raised many concerns and was met with criticism by other states<sup>4</sup> because of its clear contraposition with the international system of management and exploitation of the resources of the deep seabed in areas beyond national jurisdiction (ABNJs) as provided by the UN Convention on the Law of the Sea (UNCLOS).<sup>5</sup>

The U.S. has however never ratified UNCLOS, whose provisions are partly considered as reflecting customary international law. As the 'order shall be implemented consistent with applicable law,'<sup>6</sup> the present opinion identifies the applicable rules and shows how mining activities in ABNJs are limited under existing general international law. It then briefly discusses the obligations binding UNCLOS states parties in connection with the Executive Order and future activities licensed on its basis. The role of the International Seabed Authority (ISA),<sup>7</sup> the international body entrusted by UNCLOS with the management of the deep seabed area (the Area), is then considered and some concluding considerations presented.

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<sup>2</sup> Executive Order 'Unleashing America's Offshore Critical Minerals and Resources,' 24 April 2025, Section 1. The Executive Order is available here: <https://www.whitehouse.gov/presidential-actions/2025/04/unleashing-americas-offshore-critical-minerals-and-resources/>.

<sup>3</sup> For instance, Japan conducted its first excavation test of a cobalt-rich crust in its continental shelf in 2020 (see: [https://www.jogmec.go.jp/english/news/release/news\\_01\\_000033.html](https://www.jogmec.go.jp/english/news/release/news_01_000033.html)) and in 2024 Norway officially opened part of its continental shelf to seabed mining activities (see: <https://site.uit.no/nclos/2024/04/29/norway-formally-opens-the-norwegian-continental-shelf-to-seabed-mining-exploration-activities-rowing-against-the-tide/>).

<sup>4</sup> See the reactions of China (<https://www.bbc.com/news/articles/cx2v37z333lo>) and France (<https://www.france24.com/en/live-news/20250428-trump-s-deep-sea-mining-order-violates-global-norms-france>).

<sup>5</sup> 1833 UNTS 3.

<sup>6</sup> Executive Order, Section 5.

<sup>7</sup> For more information, see the ISA official website: <https://www.isa.org.jm>.

## The international law rules binding the U.S.

The U.S. was an active participant of the UNCLOS negotiation and it signed the final act of the negotiation on the 10th of December 1982. The lack of subsequent ratification does not preclude the application to the U.S. of a series of international law rules pertaining to the law of the sea and to the law of treaties. First, the U.S. is bound by an obligation of good faith, stemming from customary international law as codified in Art. 18 of the Vienna Convention on the Law of Treaties.<sup>8</sup> This article provides that a 'State is obliged to refrain from acts which would defeat the object and purpose of a treaty' once it has signed it. The U.S. is then bound to respect the object and purpose of UNCLOS, including some of its core principles pertaining to ABNJ's and deep seabed mining. Second, as any other state, the U.S. is bound by customary international law applicable to the activities concerned, which include relevant rules from the law of the sea, beyond UNCLOS, and from international environmental law, such as the duty to prevent harm, of cooperation, to perform an environmental impact assessment, etc.<sup>9</sup>

The U.S. has several times recognised the applicability of these rules, as clearly stated in the Deep Seabed Hard Resources Act,<sup>10</sup> as referred in the Executive Order:<sup>11</sup> the 'United States (...) exercises its jurisdiction over United States citizens and vessels, and foreign persons and vessels otherwise subject to its jurisdiction, in the exercise of the high seas freedom to engage in exploration for, and commercial recovery of, hard mineral resources of the deep seabed *in accordance with generally accepted principles of international law* recognized by the United States; but (...) *does not thereby assert sovereignty or sovereign or exclusive rights or jurisdiction over, or the ownership of, any areas or resources in the deep seabed.*' (emphasis added). The U.S. has also expressed several times its recognition of the relevant customary norms, including the principle of common heritage of (hu)mankind which governs the deep seabed in ABNJ's.<sup>12</sup> Confirmations of the non-contestation and actual participation of the U.S. in the system created by UNCLOS in 1982 can be found in its status of observer within the

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<sup>8</sup> 1155 UNTS 331.

<sup>9</sup> These obligations have been recognised as customary international norms in several relevant decisions by the International Court of Justice and International Tribunal for the Law of the Sea. For an overview of the relevant case law, see *inter alia* P.-M. Dupuy, G. Le Moli, J. E. Viñuales, 'Customary International Law and the Environment,' in L. Rajamani, J. Peel (eds) *The Oxford Handbook of International Environmental Law* (2021) 385ff. Once an obligation is ascertained as customary international, it binds all states except those who fall in the category of 'persistent objector.' The above mentioned principles thus apply to the U.S. as customary general law.

<sup>10</sup> 30 U.S.C. 1402(a) 'Disclaimer of extraterritorial sovereignty,' available here: <https://uscode.house.gov/view.xhtml?path=/prelim@title30/chapter26&edition=prelim>.

<sup>11</sup> Executive Order, Section 3.

<sup>12</sup> 30 U.S.C. 1402(b); see *inter alia* K. Elmahmoud, 'American Pick and Choose or Customary International Law?,' *EJIL Talk!* of 17 January 2024, <https://www.ejiltalk.org/american-pick-and-choose-or-customary-international-law/>; C. Lathrop, 'The Latest Trump Threat to International Law: Unilaterally Mining the Area,' *EJIL Talk!* of 6 May 2025, <https://www.ejiltalk.org/the-latest-trump-threat-to-international-law-unilaterally-mining-the-area/>. To note also that the US was part of the ISA Council group A in 1996, 1997, and 1998 ([https://www.google.com/url?q=https://www.isa.org.jm/wp-content/uploads/2024/03/Composition\\_of\\_the\\_Council\\_1996-2026-1.xlsx&sa=D&source=docs&ust=1750785367307651&usg=AOvVawIzlg031HHO69QVqkfy2S9q](https://www.google.com/url?q=https://www.isa.org.jm/wp-content/uploads/2024/03/Composition_of_the_Council_1996-2026-1.xlsx&sa=D&source=docs&ust=1750785367307651&usg=AOvVawIzlg031HHO69QVqkfy2S9q)).

ISA and its active role therein over the years,<sup>13</sup> and in several official documents of U.S. agencies. For instance, the executive summary concerning the extended continental shelf project of the U.S., a project involving the U.S. State Department, NOAA and USGC,<sup>14</sup> affirms: ‘Since its adoption in 1982, the United States has strongly supported the Convention [i.e., UNCLOS] and it has been the policy of the United States to act in a *manner consistent with its provisions* with respect to traditional uses of the ocean. *The Convention generally reflects customary international law binding on all countries.*’ (emphasis added).<sup>15</sup>

The U.S. has several times recognised the customary nature of the rules contained in the UNCLOS and has consistently behaved with them. Those rules then also apply to the Executive Order discussed here.

### Assessing the Executive Order in light of the applicable international law

If some doubts exist concerning the customary nature of some UNCLOS provisions, in particular the ones of a more technical nature,<sup>16</sup> the core principles regulating the regime of the different maritime zones have been widely recognised and complied with. Those include the principle of common heritage of (hu)mankind, codified in Art. 136 UNCLOS and which was first internationally affirmed in 1967 in the seminal intervention of Arvid Pardo at the UN General Assembly.<sup>17</sup> The principle relies on two main tenants: the Area and its resources cannot be alienated; rights in the resources of the Area are vested in (hu)mankind as a whole (Art. 137 UNCLOS). Those tenants bind states and natural or juridical persons.

The UNCLOS then specifies that the exploration and exploitation of the Area resources can only take place pursuant to the system it created. Considering that those specific provisions do not apply to the U.S., the two above-mentioned tenants still limit what and how the White House regulates deep seabed mining in ABNJs. Concretely, they prohibit any state to claim any exclusive rights on the resources of the Area and render any U.S. issued-licence in breach of international law.

Furthermore, pursuant to international environmental law obligations having customary nature, the U.S. could be held responsible for any environmental harm that would occur as a consequence of activities it licences in ABNJs, whether directly performed by public entities or private companies registered in the U.S. The relevant environmental law rules include, as already mentioned, the no harm principle, the principle of prevention and the duty to cooperate.

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<sup>13</sup> The list of observers at the ISA is available here: <https://www.isa.org/jm/observers/>.

<sup>14</sup> United States Department of State, *The Outer Limits of the Extended Continental Shelf of the United States of America: Executive Summary*, Washington, 2023 (revised 2025), [https://www.state.gov/wp-content/uploads/2025/02/ECS\\_Executive\\_Summary.pdf](https://www.state.gov/wp-content/uploads/2025/02/ECS_Executive_Summary.pdf).

<sup>15</sup> Ibid., p. 6.

<sup>16</sup> The UNCLOS preamble recognises that the convention consists of a ‘codification and progressive development of the law of the sea.’ After more than 40 years of its adoption, most of the Convention is considered reflecting customary international law, except for the parts concerning the institutions created by UNCLOS (i.e., the International Seabed Authority, the International Tribunal for the Law of the Sea, and the Commission on the Limits of the Continental Shelf) and dispute settlement (Part XV UNCLOS).

<sup>17</sup> UNGA, First Committee, 1515th meeting, 1 November 1967, available here: [https://www.un.org/depts/los/convention\\_agreements/texts/pardo\\_ga1967.pdf](https://www.un.org/depts/los/convention_agreements/texts/pardo_ga1967.pdf).

### The obligations binding state parties to UNCLOS

State parties to UNCLOS have a general obligation to behave in the Area in accordance with the convention, ‘principles embodied in the Charter of the United Nations and other rules of international law in the interests of maintaining peace and security and promoting international cooperation and mutual understanding’ (Art. 138). The obligations extend to states and natural or juridical persons having the nationality of a state party (Arts 137.3 and 139.1). This means that UNCLOS parties shall not engage with any illegal activity performed on the basis of licences granted pursuant to the Executive Order, and that they shall prevent their nationals from participating in the said activities. This clearly emerges from the letter of Art. 137.3 which states: ‘No State or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this Part. Otherwise, no such claim, acquisition or exercise of such rights shall be recognized.’

Possible conducts that can be included in the prohibition contained in Art. 137.3, jointly read with Art. 139.1,<sup>18</sup> include: 1) the participation of vessels flagged in an UNCLOS state party in mining operations and the subsequent transportation of minerals; 2) the acquisition and reselling of minerals recovered in the Area in violation of UNCLOS provisions by companies and natural persons having the nationality of an UNCLOS state or being controlled by a nationals of a state party. UNCLOS States parties are then expected to prevent and eventually sanction those conducts. If they do not put in place the necessary measures, they can be considered in breach of UNCLOS obligations and thus responsible under international law.

UNCLOS state parties can exercise jurisdiction to enforce their obligations on the ground of nationality. This does not raise particular issues concerning the exercise of jurisdiction on vessels flying their flags, as they have exclusive jurisdiction pursuant to Art. 92 UNCLOS. More problematic is the exercise of jurisdiction on natural or juridical persons who are participating in mining activities using a vessel flagged in another state, which may or may not be a party to UNCLOS. The exercise of jurisdiction by the national state is then concurrent to the exercise of jurisdiction by the flag state and might trigger conflict between the two or more involved states.

### The role of the International Seabed Authority (ISA)

The ISA is an independent international organisation created by UNCLOS, which has been entrusted to act and to regulate on behalf of (hu)mankind the management and exploitation of the resources of the Area (Art. 137.2). It grants the necessary licences to perform activities in the Area and is competent to protect the marine environment thereto (Art. 147).

The Executive Order triggered a reaction from the ISA<sup>19</sup> which clearly affirmed its central role in regulating and managing all commercial activities in the Area. It also highlighted that

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<sup>18</sup> ‘States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part. The same responsibility applies to international organizations for activities in the Area carried out by such organizations.’

<sup>19</sup> See: <https://www.isa.org.jm/faq-for-media/>.

it considered any unilateral activity performed outside the multilateral system it oversees as illegal under international law and that such activity ‘may incur legal, diplomatic, economic, security, financial and reputational risks.’<sup>20</sup> The ISA however cannot take any direct action against a state which is not a party to UNCLOS and is then restrained to possible actions against companies which already have concluded contracts within the ISA system. This is the case for The Metal Company (TMC), which has a licence granted by the ISA and sponsored by Nauru.<sup>21</sup> The fact that TMC now expressed its involvement in mining activities authorised pursuant to the Executive Order could be considered a breach of that contract<sup>22</sup> and thus subject to penalties pursuant to Art. 18 Annex III of UNCLOS. The ISA could therefore suspend or terminate the contract, and impose financial penalties to the contractor.

Lastly, the ISA, specifically the Council, has an important role to play in monitoring whether UNCLOS state parties participate in any way in activities licensed under the Executive Order. It has monitoring powers on the entire Area, which would then include any location considered for mining activities by U.S. authorities. In accordance with Art. 187 UNCLOS, the ISA could bring a case in front of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS)<sup>23</sup> against a state party or a contractor concerning any act or omission in violation of the applicable rules.

### Concluding remarks and way forward

The Executive Order ‘Unleashing America’s Offshore Critical Minerals and Resources’ clearly breaches international customary rules which bind the U.S. in its activities in areas beyond national jurisdiction. It also triggers a series of obligations for UNCLOS state parties to not participate and to prevent the participation and the possible commercial outcomes of mining activities performed on the basis of the Executive Order.

Any state is also entitled to take action to contest the performance of illegal mining activities, e.g. deep seabed mining which has been unilaterally licenced in breach of the applicable international law obligations. Those could include formal diplomatic protests, possible diplomatic and economic sanctions, measures taken against nationals involved in the activities and possible physical presence on location for deterrence. The matter of the international legality of the Executive Order could also be discussed in the relevant fora, including the possible request for an advisory opinion to ITLOS or the International Court of Justice concerning the broader question of the rights and obligations of non parties to UNCLOS in relation to deep seabed mining in the Area. Even if advisory opinions are not legally binding, they consist of authoritative interpretations of the law. They can provide useful guidance for States and, specifically in the context of deep seabed mining activities, for interested private entities.

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<sup>20</sup> Ibid.

<sup>21</sup> TMC subsidiary Nauru Ocean Resources Inc (NORI), sponsored by Nauru, concluded an exploration contract with the ISA on 22 July 2011; see <https://www.isa.org.jm/contractor/nauru-ocean-resources-inc/>.

<sup>22</sup> The ISA affirmed that : ‘A contractor’s unilateral departure from the ISA regime, such as conducting commercial mining under a non-ISA licence, would constitute a serious breach of the trust and legal obligations underpinning its relationship with the ISA.’ See FAQs for the media on ‘Recent developments with US Executive Order and The Metals Company,’ <https://www.isa.org.jm/faq-for-media/>.

<sup>23</sup> For more information, see the webpage of the Seabed Disputes Chamber: <https://www.itlos.org/en/main/the-tribunal/chambers/>.