

2025 Executive Order on Seabed Mining: Is the USA really a Persistent Objector to the Common Heritage of Humankind principle in the Area as Customary International Law or an Inconsistent Objector?

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1. INTRODUCTION

This short article is an analysis in response to Professor James Kraska's article titled: "The U.S. Executive Order on Seabed Mining is Consistent with International Law",¹ mainly focusing on the part of the article that argues that the USA qualifies as a persistent objector to the common heritage of humankind(CHH) principle in the deep seabed Area beyond national jurisdiction(the Area) as a rule of customary international law.² In April 2025, the United States of America (USA) President adopted an Executive Order titled 'Unleashing America's Offshore Critical Minerals and Resources', with rather controversial provisions that appears to have blindsided a large chunk of the international community, indicating that the USA could unilaterally mine the deep seabed area beyond national jurisdiction (the Area).³ In one of the current author's books published as far back as 2011, he had argued as a theoretical exercise, which has now become a real life situation with the 2025 USA Executive Order, that the principle of the common heritage of humankind (CHH) in the Area is a rule of customary international law which is binding on all States, including non-party States of the United

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¹ 106 *INT'L L. STUD.* 499 (2025), pp.499-514.

² *Id.* at pp.510-513

³ See section 3(a)(i) of the Executive Order, Exec.Order No.14285, 90 Fed. Reg.17735(Apr.24, 2025), <https://www.presidency.ucsb.edu/documents/executive-order-14285-unleashing-americas-offshore-critical-minerals-and-resources> states: "Within 60 days of the date of this order: (a) The Secretary of Commerce shall: (i) Acting through the Administrator of the National Oceanic and Atmospheric Administration, and in consultation with the Secretary of State and the Secretary of the Interior, acting through the Director of the Bureau of Ocean Energy Management, expedite the process for reviewing and issuing seabed mineral exploration licenses and commercial recovery permits in *areas beyond national jurisdiction* under the Deep Seabed Hard Mineral Resources Act (30 U.S.C.1401 et seq.), *consistent with applicable law*. The expedited process, *consistent with applicable law*, should ensure efficiency, predictability, and competitiveness for American companies." (italics for emphasis)

Nations Convention on the Law of the Sea (UNCLOS) 82, as modified by the 1994 Implementation Agreement.⁴ Any unilateral mining of the Area would be contrary to the fundamental notion of CHH, which is the bedrock of mining activities in the Area as outlined in Part XI of UNCLOS 82, as modified by the 1994 Implementation Agreement. It is interesting to note that the Executive Order indicates that its provisions must be 'consistent with applicable law.'⁵ Thus, since the CHH principle, as a rule of customary international law, is part of US law, the section of the Executive Order dealing with the Area would clearly be inconsistent with the relevant applicable law. Several great works have recently been published arguing that the 2025 US Executive Order contrary to customary international law.⁶ Furthermore, various positions have been taken that the US Executive Order is not in line with customary international law, such as the statement from the Secretary-General of the International Seabed Authority (ISA),⁷ the intergovernmental organisation given the mandate by the international community under the UNCLOS 82, as modified by the 1994 Implementation Agreement, to manage mineral-related activities in the Area, following a protracted multilateral process through the Third United Nations Conference on the Law of the Sea (UNCLOS III) and the post-UNCLOS III negotiations as a result of several developed States', including the United States' objections to chapter XI provisions. The United States signed the 1994 Implementation Agreement, which addressed those concerns, although it is not yet a party to UNCLOS 82 or this Agreement. Others, including the European Union and China, have made explicit assertions that the US Executive Order is inconsistent to customary international law.⁸ Professor James Kraska and the United States in platforms such as the

⁴ See EDWIN EGEDE, AFRICAN AND THE DEEP SEABED REGIME: POLITICS AND INTERNATIONAL LAW OF THE COMMON HERITAGE OF MANKIND 66-71(2011).

⁵ See section 3(a)(i) of the Executive Order (see note 3 above)

⁶ See for example, see JOANNA DINGWALL, INTERNATIONAL LAW AND CORPORATE ACTORS IN DEEP SEABED MINING 161-190 (2021); Coalter Lathrop, *The Latest Trump Threat to International Law: Unilaterally Mining the Area*, EJIL TALK (2025), <https://www.ejiltalk.org/the-latest-trump-threat-to-international-law-unilaterally-mining-the-area/> ; Rián Derrig and Kahlil Hassanali, *Understanding Executive Order 14285: On the Possibility of Authorizing Seabed Mining in Areas Beyond National Jurisdiction*, 29(9) ASIL INSIGHTS (2025) , [ASIL Insights 2025 V29 I9.pdf](#) and Klaas Willaert, *Thoughts on the Recent US Executive Order on Deep Sea Mining: Risky Bluff or Deliberate Violation?*, 40 THE INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 1-10 (2025).

⁷ See Int'l Seabed Auth., *Secretary-General Statement on the US Executive Order: 'Unleashing America's Offshore Critical Minerals and Resources'*, (Apr. 30, 2025), <https://www.isa.org.jm/news/statement-on-the-us-executive-order-unleashing-americas-offshore-critical-minerals-and-resources/>

⁸ Robert Hodgson, *European Commission questions legality of US seabed mining plans*, EURO NEWS (Apr. 28, 2025), <https://www.euronews.com/my-europe/2025/04/28/european-commission-questions-legality-of-us-seabed-mining-plans> and Foreign Ministry Spokesperson Guo Jiakun's Regular Press Conference on April 25, 2025, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA (Apr.25, 2025)https://www.mfa.gov.cn/eng/xw/fyrbt/lxjzh/202504/t20250425_11604503.html

recent Meeting of the States Parties to the United Nations Convention on the Law of the Sea (SPLOS) and the recently concluded ISA Assembly meeting at the second part of its 30th session, have attempted to exclude the application of the CHH as customary international law to the United States by claiming that the United States is a persistent objector to the CHH.⁹ This approach is unsurprising given that any international lawyer confronted with rather compelling arguments that customary international law applies would naturally explore the possibility of the doctrine of persistent objector to argue that the State they advocate for is exempt from the rule. This short analysis presents the legal context for the doctrine of the persistent objector under international law, detailing briefly both arguments for and against its continued application in contemporary international law. Following that, it argues that, based on the relevant facts applicable over the years to the USA position on CHH in the Area, the argument that the USA is a persistent objector is misconceived, and that, at best, the USA is an inconsistent objector to the principle CHH, which falls short of the requirements of a persistent objector under public international law. It ends with some concluding remarks.

2. DOCTRINE OF THE PERSISTENT OBJECTOR

Professor Kraska recently argued that the doctrine of the persistent objector applies if CHH is treated as a rule of customary international law, in which case the United States is exempt.¹⁰ In what appeared to be a coordinated strategy, the United States, as observers at the 35th meeting of the SPLOS and the 2nd part of the Assembly 30th session of the ISA, invoked this doctrine in relation to UNCLOS 82 provisions on seabed mining, presumably including the CHH, with nearly identical statements. In its statement at the SPLOS and the ISA the USA's representatives stated: "... as a non-party to the Law of the Sea Convention, the United States is not bound by the Convention rules dealing with seabed mining through the International Seabed Authority. The United States' practice and public statements on this subject have been clear and consistent on this matter for over 40 years."¹¹ The persistent objector doctrine is

⁹ Kraska, *The U.S. Executive Order on Seabed Mining is Consistent with International Law* op.cit. at 510-514.(see note 1). See also Meeting of States Parties to the United Nations Convention on the Law of the Sea, *Statement of the USA(Observer)*,– Nathan Nagy, *United States(Agenda Item 13)*(June 25, 2025) https://estatemnts.unmeetings.org/estatemnts/61.0130/20250626100000000/xSXHGjcqL/K-JrukDLY_nyc_en.pdf and Int'l Seabed Auth., *U.S. Intervention on Agenda Item 8 International Seabed Authority Assembly, 30th Session* (July 2025), <https://www.isa.org.jm/sessions/30th-session-2025/usa-statement-for-isa-assembly-july-2025/>

¹⁰ Kraska, *Id.*

¹¹ See note 9 above

quite controversial, and a limited number of scholars believe it is irrelevant in contemporary international society. For instance, Cassese, had argued that this doctrine is no longer applicable because of the “current community-oriented configuration of international relations” and he took the view that ‘...there is no firm support in State practice and international case law for a rule on the ‘persistent objector’. The only explicit contention in favour of this doctrine is set out in two obiter dicta of the ICJ (in *Asylum* and *Fisheries*) and in the pleadings of the UK and Norway in *Fisheries*.”¹² This present author does not necessarily agree with Cassese's minority viewpoint. According to the International Law Commission (ILC), it is a notion that is 'widely acknowledged by States and writers as well as scientific groups working in international law.' ¹³ This doctrine is an exception to the general rule that customary international law is applicable to all states.¹⁴ According to the ILC when a State objects to a rule of customary international law while it is being formed, the State would be exempt from such rule for as long as the State maintains its objection. With such objection being clearly expressed, communicated to other States, and maintained persistently.¹⁵

The doctrine of persistent objector is subject to 'stringent requirements,' as underlined by the ILC, ¹⁶ and the burden of proving that it is a persistent objector is squarely on the state asserting it. ¹⁷ It is argued that this burden has a high threshold because accepting a low one

¹² ANTONIO CASSESE, *INTERNATIONAL LAW* 163 (2d ed., 2005). See also P. Dumberry, *Incoherent and Ineffective: The Concept of Persistent Objector Revisited*, 59 *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY* 779-802(2010).

¹³ Conclusion 15 commentary 4, Int'l Law Comm'n, Rep. of the Work of Its Seventieth Session, Int'l Law Comm'n, Rep. of the Work of Its Seventieth Session, *Draft Conclusions on Identification of Customary International Law*, at 146, U.N. Doc. A/73/10 (2018), https://legal.un.org/ilc/reports/2018/english/a_73_10_advance.pdf [hereinafter ILC Draft Conclusions], which was adopted by the UN General Assembly in A/RES/73/203(2019), <https://docs.un.org/en/A/RES/73/203>

See also JAMES GREEN, *THE PERSISTENT OBJECTOR RULE IN INTERNATIONAL LAW*, 33-56(2016) where the author explores the rules' case law affirmations and points out that a majority of scholarly opinions, while they are by no means unanimous, support it.

¹⁴ *North Sea Continental Shelf Cases* (Federal Republic of Germany v Denmark/Federal Republic of Germany v Netherlands) 1969 ICJ 3 at 38, had stated that customary rules ‘by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its favour’

¹⁵ Conclusion 15, ILC Draft Conclusions, supra note 13, Although the ILC said that the notion of the persistent objector does not apply to jus cogens norms, and this author subscribes to the position that the CHH is a jus cogens norm For instance, the Group of 77 challenging the unilateral legislation and agreements by the USA and a couple of other Western developed States in respect of the Area argued that these legislation and agreements were illegal because ‘... the principle of the [CHH] is a customary rule which has the force of peremptory norm...’ (EGEDE, supra at 70-71. See note 4). Considering the typically problematic character of CHH as jus cogens, the current author has intentionally opted not to pursue arguments on this matter in this commentary.

¹⁶ *Id*, commentary 1

¹⁷ *Id*, commentary 3

would completely undermine the essential aspect of the dual requirement of customary international law, state practice and *opinio juris*, which is that what is required is state practice of the generality of States, rather than complete universality in state practice. It has been said that even a single explicit assertion contradicting the objection would be fatal, making the bar high.¹⁸ It was also noted by the ILC that "...that the objection be maintained persistently applies both before and after the rule of customary international law has emerged."¹⁹ Thus, what is required is not only persistence but also consistency in the objections without significant contradictions.²⁰ Green explains the distinction between persistence and consistency as follows:

‘Consistency is, of course, not the same thing as persistence... the term ‘persistence’ denotes repetition, as well as a degree of steadfastness. Consistency, on the other hand, requires a level of uniformity of objection, or what might be termed ‘non-derogation’ by the state from its dissenting stance. A state could ‘persistently’ object to a newly forming law (by regularly and repeatedly rejecting it), but in fact do so inconsistently (by accepting or affirming the norm on a minority of occasions, in the midst of its general policy of objecting persistently’²¹

3. IS THE USA REALLY A PERSISTENT OBJECTOR OR AN INCONSISTENT OBJECTOR?

At best, the USA's objections have been inconsistent with some notable contradictions, as evidenced by the context of the USA State practice before the adoption of UNCLOS 82 and the entry into the force of UNCLOS 82, as modified by the 1994 Agreement. Kraska, had indicated that ‘[f]or the United States, opposition to Part XI is evidenced through executive statements and diplomatic conduct, with [the Deep Seabed Hard Mineral Resources Act of 1980] DSHMRA serving as a legislative cornerstone. The DSHMRA’s significance as State practice.’²² Although the DSHMRA incorrectly declares that exploration and exploitation of mineral resources in the Area are part of the freedoms of the high seas,²³ the same legislation stated that the USA affirmed its support for the United Nations General Assembly Resolution 2749 (XXV) of 17

¹⁸ See, e.g., RICHARD PRICE, EMERGING CUSTOMARY NORMS AND ANTI-PERSONNEL LANDMINES IN THE POLITICS OF INTERNATIONAL LAW 1106, 123-124(Reus-Smit ed.2004) and GREEN, THE PERSISTENT OBJECTOR IN INTERNATIONAL LAW, SUPRA AT 118-120 (see note 13)

¹⁹ *Draft Conclusions on Identification of Customary International Law*, supra, (see note 13), commentary 9.

²⁰ *Id*

²¹ GREEN, THE PERSISTENT OBJECTOR RULE IN INTERNATIONAL LAW AT 109(see note 13). See also Yeini, Shelly Aviv, *The Persistent Objector Doctrine: Identifying Contradictions*, 22(2) CHICAGO JOURNAL OF INTERNATIONAL LAW, 581, 598(2021).

²² Kraska, *The U.S. Executive Order on Seabed Mining is Consistent with International Law*, supra at 510(see note 1)

²³ 30 U.S.C. §1401(a)(12)

December 1970, 'declaring inter alia the principle that the mineral resources of the deep seabed are the common heritage of mankind[CHH], with the expectation that this principle would be legally defined under the terms of a comprehensive international Law of the Sea Treaty yet to be agreed upon.'²⁴ In its identical statements the USA as an observer State to the 35th meeting of the SPLOS and the 2nd part of the Assembly 30th session of the ISA it pointed out that its "participation in the Conference and its support for certain General Assembly resolutions concerning sea-bed mining do not constitute acquiescence by the United States in the elaboration of the concept of the common heritage of mankind contained in Part XI, nor in the concept itself as having any effect on the lawfulness of deep sea-bed mining."²⁵ However, it does not present any compelling reasons to explain the mismatch between its position of supporting General Assembly resolutions identifying the Area and its resources as CHH and its stated claim to be a persistent objector. Additionally, the USA, along with other industrialised western states, had refused to adopt and ratify the UNCLOS 82 not because that it had concerns with the concept of CHH, but rather because of the way certain aspects of part XI of UNCLOS 82 were framed. While the 1994 Implementation Agreement addressed these concerns by drastically modifying several elements of Part XI of UNCLOS and watering down the CHH, it nevertheless retained the CHH as the fundamental principle governing the Area's regime.²⁶ Yet the USA signed the 1994 Agreement and took certain practical steps that appear to be inconsistent with their objections to the Area as CHH. For example, the United States, as a non-party State, accepted the Agreement's provisional application and provisional membership in the ISA and its organs and bodies until November 16, 1998,²⁷ even though it

²⁴ 30 U.S.C. §1401(a)(7). See also Willaert, *Thoughts on the Recent US Executive Order on Deep Sea Mining: Risky Bluff or Deliberate Violation?*, supra at 7-8 who refer to other aspects of DSHMRA that could affirm the position that the USA in some regards supports the CHH and Lathrop, *The Latest Trump Threat to International Law: Unilaterally Mining the Area*, supra (See note 6)

²⁵ See note 9 above

²⁶ The second preamble of the 1994 Implementation Agreement reaffirmed: 'that the seabed and ocean floor and subsoil thereof, beyond 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.'

²⁷ See Article 7(1)(b) of the 1994 Implementation Agreement states: 'If on 16 November 1994 this Agreement has not entered into force, it shall be applied provisionally pending its entry into force by:

- (a) ...
- (b) States and entities which sign this Agreement, except any such State or entity which notifies the depositary in writing at the time of signature that it will not so apply this Agreement.
- (c) ...
- (d) ...'

Also see Jonathan I. Charney, *U.S. Provisional Application of the 1994 Deep Seabed Agreement*, THE 88(4) AMERICAN JOURNAL OF INTERNATIONAL LAW, 705-714(1994) and EGEDE, AFRICAN AND THE DEEP SEABED REGIME ETC SUPRA AT.25-26(see note 4)

could decline the Agreement's provisional application,²⁸ thereby affirming its support for CHH. Following that, the USA became an observer with the ISA and actively participated in discussions on developing the Area's regime, with CHH as its core principle, albeit without the ability to vote due to its observer status,²⁹ until recently at the 35th meeting of the SPLOS and the 2nd part of the Assembly 30th session of the ISA, when it issued statements indicating that it objects to the CHH. Furthermore, during the BBNJ negotiations, the USA demonstrated inconsistency in its objections to CHH in the Area by making the following statement: '*We support application of the concept of the common heritage of mankind [CHH] to mineral resources in the Area*, as is clearly articulated in the Law of the Sea Convention. However, we do not support the application of this concept beyond that, and in particular, we oppose any application of the concept of "common heritage of mankind" to marine genetic resources in areas beyond national jurisdiction.'³⁰ (underlined part made by present author for emphasis). Additionally, while Kraska correctly points out that an objection by a persistent objector can be demonstrated by legislation, diplomatic activity, and the executive statements, he fails to address inconsistencies in the United States' executive declarations and legislative procedures.³¹ It is common knowledge that since the 1994 Implementation Agreement was adopted to address the concerns of the United States, several American presidents (Bill Clinton, George W. Bush, and Barack Obama) representing the executive branch of government from both the Democratic and Republican Parties have worked to get the United States to ratify UNCLOS 82 and 1994 Agreement, which obviously includes the CHH provisions. They have done this by submitting it to the Senate, which is tasked by the US Constitution with advising and consenting before the president can accede to treaties.³² Unfortunately, the

²⁸ For e.g. Morocco by notification chose not to apply the 1994 Agreement provisionally. See LAW OF THE SEA BULLETIN, SPECIAL ISSUE IV OF 16 NOVEMBER 1994 AT 46.

²⁹ <https://www.isa.org.jm/observers/>. See Willaert, "Thoughts on the Recent US Executive Order on Deep Sea Mining: Risky Bluff or Deliberate Violation?", op.cit at p.8

³⁰ View Expressed by the United States Delegation Related to Certain Key Issues Under Discussion at the Second Session of the Preparatory Committee on the Development of an Internationally Legally Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity, September 9, 2016,

https://www.un.org/depts/los/biodiversity/prepcom_files/USA_Submission_of_Views_Expressed.pdf

³¹ John A. Duff, *The United States and the Law of the Sea Convention: Sliding back Accession and Ratification*, 11 OCEAN AND COASTAL LAW JOURNAL, 1-36 (2005)

³² Article II, section 2 of the USA Constitution. See for e.g. Lugar, Richard, *Failure to Ratify UNCLOS A Position of Self-Imposed Weakness*, HAMPTON ROADS INTERNATIONAL SECURITY QUARTERLY; PORTSMOUTH 13 (Jul 1, 2012); David D. Caron & Harry N. Scheiber, "The United States and the 1982 Law of the Sea Treaty", (2007) ASIL Insights Volume: 11 Issue: 16, <https://www.asil.org/insights/volume/11/issue/16/united-states-and-1982-law-sea-treaty> ; Ibid at 16-32; Office of the Staff Judge Advocate, "U.S. Position on the U.N. Convention on the Law of the Sea", 97 INT'L L. STUD.

Senate has failed to grant such advice and consent to the president for a number of reasons, resulting in evident inconsistencies in the stance of the USA executive and legislature over UNCLOS 82 and the 1994 Agreement, including elements pertaining to CHH and the Area.³³ There is no evidence that the Senate's unwillingness to grant such advice and consent is based on a specific opposition to CHH in the Area.³⁴

4. CONCLUSION

Although the USA is not yet a Party to the UNCLOS 82 and the 1994 Implementation Agreement, and thus is not bound by the provisions of these treaties based on *res inter alios acta*, the provisions on the core principle of CHH applicable to the Area have crystallised as a rule of customary international law, making the April 2025 US Executive Order, to the extent that it allows the USA to unilaterally seek to mine the Area, as inconsistent with customary international law. The claims that the United States is a persistent objector of the principle of CHH in the Area are not compelling. As demonstrated in the preceding discussions, the United States' objections to CHH in the Area have been inconsistent over time and do not meet the rather stringent conditions, including the criterion of consistency, required for the doctrine of persistent doctrine as an exception to the applicability of general customary international law to all States under public international law.

81 (2021), pp.81-88; Dean Feinman, "Lost at the South China Sea: A Legal Rationale for Joining UNCLOS", (2024) 93 *Fordham Law Review*, pp. 945 at 963-965

³³ *Id.*

³⁴ Kraska, *supra* at 513(See note 1)

