Mining the Common Heritage without asking: Is the seabed regime capable of defending itself?

26 SEPTEMBER 2026

Alejandra Espinosa Torao



Photo from Unsplash

1. Introduction

In 2025, The Metals Company (TMC) Group attempted to pursue deep-sea mining under the United States regime through its subsidiary (and wholly owned) companies Nauru Ocean Resources, Inc. (NORI) and Tonga Offshore Mining, Ltd. (TOML). As a result, the Legal and Technical Commission (LTC) of the International Seabed Authority (ISA) initiated an enquiry into potential non-compliance with contractual obligations in July of that same year (Koch & Murray, 2026). This enquiry was the main concern of the 31st ISA Council Session of March 2026, which ended without a Mining Code, leaving unsolved key matters like benefit-sharing and liability regimes that remain unfinished and unclear. Meanwhile, the US has been pushing its own initiatives, aiming for an alternative for the

licensing of mining activities in the deep sea under its Deep Seabed Hard Mineral Resources Act (DSHMR) 1980 Act, a process that started in 2025 and, thanks to its acceleration and simplification, was completed in January 2026 (Epikhin, 2026).

Following a domestic regime to pursue deep-sea mining unilaterally in the Area, governed by the principle of the Common Heritage of Mankind (CHM) as stated in Article 136 of UNCLOS (1982), would mean escaping ISA's oversight and the legal consequences under Part XI of UNCLOS and its Implementation Agreement of 1994 for those companies that ignore their contractual obligations towards the Authority. Since the beginning of the enquiry, other companies like IMB also applied for exploration rights in an area within US domestic jurisdiction, showing that this route is one that others will want to follow (Koch & Murray, 2026). Both the ISA and the UNCLOS regimes are being challenged by a non-party State and the companies considering this new alternative; the Authority needs to fight back, but the real question is: can it?

In light of these events, this article explores the ISA's ability to face direct challenges and protect the Common Heritage of Mankind. To do so, it will evaluate the ISA's role through the questions: Is the ISA a regulator or something of its equal, or merely a coordinating body? And how can it face the challenges posed by the USA and the TMC Group? To answer these, firstly, the principle of the Common Heritage of Mankind and what it entails will be presented, as well as the relevant powers of the ISA for this scenario. Then, this article will look at whether the ISA can respond to the challenge by revising the US obligations under international law in this case, and how the situation involving NORI, TOML, and the ISA has been developing over the past five months.

2. Two Essential Notions: The Common Heritage of Mankind and the ISA's Powers

2.1. Why is the Common Heritage of Mankind Principle Relevant Here?

The first onion layer to peel off is the principle that governs the Area: the Principle of CHM (UNCLOS, 1982, art. 136). This principle has found its way into national legislation regarding seabed activities, and it is referred to in other areas of international law or of international interest, like outer space, Antarctica, International Environmental Law, or cultural heritage (Wolfrum, 2009).

The importance of the CHM principle can be found in the introduction of "mankind" as an actor in international law, on whose behalf an international administration for those areas open to the use of all States acts (Tanaka, 2023). This principle of customary international law, as understood in Article 38 of the ICJ Statute, is one of the forces motivating the

international community to question, in Tanaka (2023)'s words, "whether and to what extent international law in the twenty-first century is moving towards an international law for mankind, which is beyond the State-to-State system". Its implementation under Part XI of the Convention was the object of heated debate and one of the main reasons why the US has not adhered to UNCLOS, an important detail to remember given this article's topic.

As established in Article 1(1) of UNCLOS (1982), the Area is defined as "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction". The Area and its resources *are* the common heritage of mankind (UNGA, 1970), and Article 137(1) (UNCLOS, 1982) establishes the legal status of the Area and its resources, laying down the main content of the principle of CHM

"1. No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized."

The characteristics of the principle can be found throughout Section 2 of Part XI of the Convention, which can be divided into three essential elements: non-appropriation on the basis of sovereignty (art. 137(1)); benefit of mankind (art. 140(1)), for which activities in the Area shall be carried out, also entailing an equitable sharing of the economic benefits (art. 140(2)); and exclusive use of the Area for peaceful purposes (art. 141). As introduced earlier, another relevant factor is the right to control and manage the seabed being vested in humankind, "on whose behalf the Authority shall act" (art. 137(2)). In that regard, States shall follow the rules and provisions laid down in the Convention and the Implementation Agreement regarding licensing and sponsorship, effective control, and the establishment of the necessary measures in their national legislation to achieve such effective control (Tanaka, 2023; Thomas, 2024).

Finally, it is interesting to note that the word "heritage" entails that the CHM principle has an intergenerational element. The concept of intergenerational equity is mostly used under International Environmental Law and aims to distribute the quality and availability of natural resources and the necessary efforts for their conservation between present and future generations, basically asking for sustainable development (Dupuy & Viñuales, 2018).

Circling back to Article 137's phrasing as the main CHM provision, the stated obligation is directed to all States, not only the States Parties to the Convention (Wolfrum, 2009), meaning that the elements of the principle are also to be followed equally. Furthermore, and as Wolfrum upholds, the prohibition of occupation and appropriation under Article 137 of the Convention, a vital part of the Common Heritage of Mankind principle, is considered by some as a rule of customary international law and as enjoying the legal status whose effect is like that of ius cogens (Wolfrum, 2009).

In summary, the principle of Common Heritage of Mankind challenges the individualist or State-to-State view traditionally seen and preserved in international law through the principle of sovereignty. The main priority for the concept of CHM, rather than sovereignty, is the common benefit, which is to be achieved through the introduction of mankind as an actor in international law, and an international collaborative administration (ISA) that will manage and monitor any activity in the Area. Additionally, the core prohibition of this innovative principle, and its subsequent elements, can be seen as having a very close effect to that of ius cogens, which directly collides with the agenda of States like the US.

2.2. What are the ISA's Powers in This Regard?

The ISA is the organisation that acts on behalf of mankind. Through this organisation that propagates the principle of CHM, States Parties organize, carry out, and control activities in the Area (Baiye & Ngum, 2023; UNCLOS, 1982, art. 153(1)), to which the ISA's jurisdiction is limited. As established in the Convention, "All States Parties are ipso facto members of the Authority" (art. 156(2)). The ISA has three main organs: the Assembly, the most important organ to which the others are accountable (art. 160); the Council, the executive authority (art. 162); and the Secretariat, administrative officer of the Authority (art. 166).

Following the fundamental principles of the Authority stated in Article 157 UNCLOS (1982), the organisation and control of the activities in the Area will be done with a view to the administration of the resources. With this in mind, the Authority's powers and functions will be those expressly laid down in the Convention, and, most importantly in this case, those of *incidental* nature that are implicit and necessary for the exercise of the express ones in respect of activities in the Area (art. 157(2)). Article 17 of Annex III (UNCLOS, 1982) is more explicit regarding the legislative and enforcement jurisdiction of the ISA, providing that

"1. The Authority shall adopt and uniformly apply rules, regulations and procedures in accordance with article 160, paragraph 2(f)(ii), and article 162, paragraph 2(o)(ii), for the exercise of its functions as set forth in Part XI on, inter alia, the following matters:

(a) administrative procedures relating to prospecting, exploration and exploitation in the Area;

[...]"

The referred provisions in paragraph 1 include the Authority's legal instruments, which differ in binding force.[1] Regarding exploration and exploitation activities, these can be conducted, in association with the Authority, via those contracts approved by the Council based on recommendations from the Legal and Technical Commission (UNCLOS, 1982, arts. 153(2)(b), 162(2)(x), and 165(2)(j)). When a contractor is found to have seriously, persistently and wilfully violated its authorized contract or fails to

comply with it, the Authority may terminate or suspend the contract (Annex III, art. 18(1)). Where the concerned violation is not covered by Article 18(1)(a), the Authority may impose proportionate monetary penalties (Annex III, art. 18 (2)).

It is worth highlighting that the ISA can enact the measures that it deems necessary for the protection of the marine environment. As a matter of fact, it is the Authority's obligation to adopt the necessary measures "to ensure effective protection for the marine environment from harmful effects which may arise from such activities" (UNCLOS, 1982, art. 145). This goes hand in hand with the CHM principle, which asks for an equitable sharing of benefits and intergenerational considerations, demanding the sustainable development of activities in the Area.

So, in theory, the powers exist. The ISA's functions can be express or incidental, and, among the range of legal instruments, there are rules, regulations, and procedures that are binding on all members. When looking at exploration and exploitation contracts, a main concern in this case, the Authority can penalise the violating contractor through suspension, termination, or monetary penalties. Additionally, the protection of the marine environment enables and obliges the ISA to adopt any necessary measures in line with that goal.

If the powers are there, why is the US challenge such a hard blow for the ISA? Are these powers actually tested or never seriously invoked? And more importantly, how is the ISA acting now that these powers are being demanded to be used?

3. Can the ISA Respond to This Challenge?

3.1. Yes, the US Still Has Obligations under International Law

The US is not a party to UNCLOS, and the resources in the Area are subject to Article 87 UNCLOS. That is how the US would argument how their new road for exploration and extraction activities in the Area under the DHMRA Act is not in violation of its obligations under international law (Lathrop, 2025). Obviously, that is not the end of it.

In 1994, the US signed the Implementation Agreement, a result of its objection regarding the initial application of Part XI UNCLOS. Even though it was not ratified in the end, as a signatory it has the obligation under customary international law *"to refrain from acts which would defeat the object and purpose of a treaty"* (Vienna Convention on the Law of Treaties, 1969, art. 18(a)). Here comes into play good faith, a general principle of international law under Article 38(1)(c) (1945) of the ICJ Statute, present in Article 2 of the UN Charter, and deemed to be the governing principle of international law when creating and performing international obligations (*Nuclear Tests Case*, 1974).

Good faith is about reasonable and legitimate expectations of the parties, and its dynamic and flexible character enables it to assume gap-filling functions where the circumstances require it (Kotzur, 2009; Uçaryılmaz, 2020). So, while the US is not legally bound to comply with the substantive provisions, it has the legal obligation under customary international law, as codified in Article 18 of the Vienna Convention, to comply with customary provisions of UNCLOS and is also reasonably expected to do so in the name of good faith.

Despite not being a party to either the UNCLOS or the Implementation Agreement, the US has consistently acted as a party for thirty years, respecting the limitations and freedoms of the Convention, and participating in the UNCLOS bodies such as the ISA (Lathrop, 2025). The US acceptance of the Convention and the 1994 Agreement through consistent State practice, as well as Resolution 2749 (UNGA, 1970) and several positive US government declarations concerning the CHM principle and the 1994 Implementation Agreement (Lathrop, 2025), supports the argument that its general practice may be accepted as law, therefore fulfilling the requirements of a rule of customary international law (ICJ Statute, 1945, art. 38(1)(b)). This was further confirmed by the delegations during the 30th ISA Council Session (International Seabed Authority, 2025, para 36):

"Delegations also underlined that the principle of the common heritage of humankind, as provided for in article 136 of the Convention, was not only a rule under public international law, but also a rule of customary international law, a norm that is also binding on States that are not Parties to the Convention that have, through State practice, accepted Part XI of the Convention and the 1994 Agreement as a norm of jus cogens, a non-derogable norm under international law."

The US mining alternative would be against, if not seriously hurt, all the elements of the CHM principle, from non-appropriation to equitable benefits, going through the benefit of humankind, on whose behalf the Authority acts. Moreover, it is contrary to the rationale and arguments surrounding the general principle of good faith and the expansion of the scope of exploitation in the Area, endangers both intergenerational equity and the marine environment, departing from the goal of sustainable development.

3.2. The ISA Was on the Right Path, but Then the Tables Turned

In 2025, when the TMC Group's intentions to pursue deep seabed mining via US domestic law triggered the LTC inquiry, the international community witnessed the ISA's authority being directly challenged, but it also saw the opportunity to show its powers in action. In appearance, everything was going according to plan: the TMC group wanted to have both doors open (the US and the UNCLOS one), but the ISA was not allowing it and started taking the necessary steps to kick them out of the UNCLOS system.

Later, in May 2026, NORI and TOML lodged an application for provisional measures with the Seabed Disputes Chamber (SDC). The claim concerned alleged violations by the ISA of its international obligations regarding due process, transparency, fairness and non-discrimination in relation to the LTC inquiry, where both contractors (Kang, 2026). Among NORI's demands was ordering the Authority to "immediately suspend the LTC's inquiry regarding the alleged "possible non-compliance"" or to "refrain from taking, authorizing, or permitting any further steps or measures in connection with that inquiry pending the final decision" (*Nauru Ocean Resources Inc. v. International Seabed Authority*, 2026). These proceedings conveniently began roughly two months before NORI's end of contract with the ISA, due in July 2026.

The contractors challenged an ongoing process, not an adverse decision, which, combined with their choice of turning to the SDC, showed that the ISA system weighs enough to pose a threat to the TMC Group mining plans (Lily et al., 2026). This was the ISA's chance to prove its efficiency and clearly establish its authority; it had the legal tools and was just waiting for the Chamber's decision that would affect the power system in relation to the law of deep-sea mining (Kang, 2026). On 18 July 2026, the SDC did not grant the wide-reaching provisional measures the contractors wanted but still asked the ISA to refrain from taking certain actions that could prejudice NORI's rights (*Nauru Ocean Resources Inc. v. International Seabed Authority*, 2026). The LTC inquiry remains open, and the direct consequence of the order was the extension of NORI's contract by the ISA Council for another five years, starting from July 2026 (ISA, 2026).

Considering the facts and the unfinished inquiry pointing to non-compliance with UNCLOS and the ISA framework, it was surprising to see the ISA grant NORI's contract extension (Leonard, 2026). NORI will continue its operations, and the TMC is very likely to get its licensing under US domestic law; that is why many States are worried about the environmental impact that these activities will have in areas where the concerned companies operate and are calling for a moratorium or precautionary pause (Leonard, 2026; Ocean Rising, 2026). Besides the protection of the marine environment, these measures would also prevent the fast completion of the Mining Code, which would represent a prize for those who break the rules (Deep Sea Conservation Coalition, 2026). For now, 46 States support this.

4. Conclusion

In the past few years, the state of international law reminds one of a Tyrion Lannister's line on Game of Thrones, "Just now, kings are dying like flies". International law has been landing a blow after another in most of its areas, and the law of the sea is not an exception. Going back to this article's initial question: Indeed, the ISA is a regulatory body possessing strong

institutional powers and value; precisely for this, the TMC Group aimed to proceed swiftly.

The open LTC inquiry still represents a last chance for the ISA to demonstrate its ability to fight back and apply its enforcement powers in case contractual breaches are identified. The bigger picture reveals that customary international law and UNCLOS can prevail, and that the US deep-sea mining agenda will not benefit anyone in the long run. Fifty years of rules, Agreements, and conventions are on the line; the ISA's acts and measures *need* to match the threat, so they do not crumble before our eyes. Just, please, do not die like a fly.

List of Sources

Antsygina, E. (2026, July 10). *The ISA's proposed advisory opinion and the obligations of state parties in respect to unilateralism*. The NCLOS Blog. <https://site.uit.no/nclos/2026/07/10/the-isas-proposed-advisory-opinion-and-the-obligations-of-state-parties-in-respect-to-unilateralism/>

Baiye, E. G., & Ngum, F. K. (2023). The role of the International Seabed Authority in the management of the Area: A legal appraisal. *International Journal of Law in a Changing World, 2*.

Congressional Research Service. (2025, July 15). *Deep seabed mining: Regulatory and geopolitical developments* (CRS Report No. IF12578). <https://www.congress.gov/crs-product/IF12578>

Deep Sea Conservation Coalition. (2026, July 22). *ISA Council and Assembly start as deep sea mining becomes a test of whether international law can protect the global commons*. <https://deep-sea-conservation.org/isa-council-and-assembly-start-as-deep-sea-mining-becomes-a-test-of-whether-international-law-can-protect-the-global-commons/>

Dupuy, P.-M., & Viñuales, J. E. (2018). *International environmental law* (2nd ed.). Cambridge University Press.

Epikhin, I. (2026, April 22). *Why 2026 will decide who governs the seabed*. Global Mining Review. <https://www.globalminingreview.com/mining/22042026/why-2026-will-decide-who-governs-the-seabed/>

Hutchins, R. (2026, March 20). *No code, no permits: ISA deep-sea mining talks end in stalemate*. Oceanographic. <https://oceanographicmagazine.com/news/no-code-no-permits-isa-deep-sea-mining-talks-end-in-stalemate/>

International Seabed Authority. (2025). *Statement of the President on the work of the Council of the International Seabed Authority during the first part of the thirtieth session* (ISBA/30/C/5). <https://isa.org.jm/documents/isba-30-c-5/>

International Seabed Authority. (2026, July 13). *Application by Nauru Ocean Resources Inc. for the approval of a plan of work for polymetallic nodule exploration in the Area* (ISBA/31/C/26).

Kang, Y. (2026, June 12). Pre-exploitation litigation: Cases No. 34 and 35 and the timing of deep-sea mining governance. *EJIL: Talk!* <https://www.ejiltalk.org/pre-exploitation-litigation-cases-no-34-and-35-and-the-timing-of-deep-sea-mining-governance/>

Koch, L., & Murray, A. (2026, April 24). *Deep sea mining in 2026: Regulation, geopolitics, and the race for critical minerals*. A&O Shearman. <https://www.aoshearman.

com/en/insights/deep-sea-mining-in-2026-regulation-geopolitics-and-the-race-for-critical-minerals>

Kotzur, M. (2009). Good faith (*Bona fide*). In A. Peters & R. Wolfrum (Eds.), *Max Planck encyclopedia of public international law*. Oxford University Press.

Lathrop, C. (2025, May 6). The latest Trump threat to international law: Unilaterally mining the Area. *EJIL: Talk!* <https://www.ejiltalk.org/the-latest-trump-threat-to-international-law-unilaterally-mining-the-area/>

Lathrop, C., & Nodewald, F. (2025, December 9). Reclaiming authority: Forcing seabed mining contractors to choose between the ISA and the USA. *EJIL: Talk!* <https://www.ejiltalk.org/reclaiming-authority-forcing-seabed-mining-contractors-to-choose-between-the-isa-and-the-usa/>

Leonard, K. (2026, July 30). *Deep seabed mining: Outcomes from the ISA's July 2026 session — Continued negotiations, court orders*. Ocean Vision Legal. <https://www.oceanvisionlegal.com/post/deep-seabed-mining-outcomes-from-the-isa-s-july-2026-session-continued-negotiations-court-orders>

Lily, H., Pecoraro, A., & Singh, P. (2026, June 11). Case concerning an inquiry by the International Seabed Authority: Less a defence of due process than an attempt to short-circuit it? *EJIL: Talk!* <https://www.ejiltalk.org/case-concerning-an-inquiry-by-the-international-seabed-authority-less-a-defence-of-due-process-than-an-attempt-to-short-circuit-it/>

Moses, J. W., & Brigham, A. M. (2021). Whose benefit? A comparative perspective for the ISA. *Marine Policy, 131*.

Nauru Ocean Resources Inc. v. International Seabed Authority (Tonga Offshore Mining Limited v. International Seabed Authority), Orders on Provisional Measures, ITLOS Cases No. 34 & 35 (July 18, 2026) (Press Release No. 391).

Nauru Ocean Resources Inc. v. International Seabed Authority, Order (Inquiry), ITLOS Case No. 34 (Aug. 4, 2026).

Nauru Ocean Resources Inc. (2026, May 30). *Application for the prescription of provisional measures in Case No. 34 (Nauru Ocean Resources Inc. v. International Seabed Authority)*.

Nuclear Tests Case (Australia v. France), Judgment, 1974 I.C.J. Rep. 253 (Dec. 20).

Ocean Rising. (2026, July 18). *Deep sea mining company wins five-year extension in legal battle against ISA*. <https://www.oceanrising.co/p/deep-sea-mining-company-wins-five>

Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, 2011 ITLOS Rep. 10, Case No. 17 (Feb. 1).

Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 993.

Tanaka, Y. (2023). *The international law of the sea* (4th ed.). Cambridge University Press.

Thomas, K. R. (2024). Deep seabed mining: What is to be done about the regulatory lacuna? *Notre Dame Journal of International & Comparative Law, 14*(2).

Uçaryılmaz, T. (2020). The principle of good faith in public international law. *Estudios de Deusto, 68*(1), 43–59. <https://doi.org/10.18543/ed-68(1)-2020pp43-59>

United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, 1833 U.N.T.S. 396 (entered into force Nov. 16, 1994).

United Nations General Assembly. (1970, December 17). *Declaration of principles governing the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction* (A/RES/2749(XXV)).

Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

Wolfrum, R. (2009). Common heritage of mankind. In R. Wolfrum (Ed.), *Max Planck encyclopedia of public international law*. Oxford University Press.

There are rules, regulations, and procedures by the Assembly; standards; guidelines; recommendations by the Legal and Technical Commission on Council recommendation; and exploration contracts. (UNCLOS, 1982, arts 160(2)(f)(ii), 162(2)(o)(ii), and 165; and Annex III)

EPIS