

Legal feasibility study of an EU prohibition on placing deep-sea minerals on the EU market

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Introduction

1. **Deep-sea mining.** The deep sea refers to the seabed below 200 meters of the surface. It contains vast deposits of metal-rich minerals, some of which, such as copper, cobalt, nickel and manganese, are currently widely used in industrial and electronic applications. At the same time, it is one of the least understood and most fragile ecosystems on the planet. The deep sea hosts unique species and ecosystem functions that have developed over geological timescales.¹

Experts have highlighted substantial gaps in current knowledge of deep-sea ecosystems, significantly limiting our ability to assess the harm caused by mining activities.² In particular, the determination of harm thresholds – that is, levels of environmental degradation considered tolerable by humankind – requires more comprehensive scientific investigation and understanding.³ Notwithstanding, on the basis of existing evidence, current scientific knowledge suggests that impacts of deep-sea mining (**‘DSM’**) are likely to be large-scale, long-lasting and potentially irreversible.⁴

2. **UNCLOS.** The United Nations Convention on the Law of the Sea (**‘UNCLOS’**) provides that the seabed beyond national jurisdiction (the **‘Area’**) and its resources are the “*common heritage of [hu]mankind*”⁵ and that all rights in the resources of the Area are vested in humankind as a whole⁶. Part XI of UNCLOS, together with UNCLOS Annex III and the 1994 Agreement relating to the Implementation of Part XI of UNCLOS of 10 December 1982 (**‘1994 Agreement’**), establishes the legal framework governing the status and the management of the Area and its resources.
3. **International Seabed Authority (‘ISA’).** Pursuant to UNCLOS and the 1994 Agreement, the ISA is the intergovernmental organisation through which member states organise and control the mineral resources activities of the Area. The ISA has currently issued 30 active exploration licenses on the basis of specific regulations for three types of mineral resources. Currently, the ISA is developing rules, regulations and procedures (the **‘Mining Code’**) for mineral exploitation of the Area. The Mining Code is expected to set the relevant environmental, financial and operational standards for this emerging industry. However, significant outstanding issues remain in 2026⁷, making early adoption of the Mining Code, including standards and guidelines, unrealistic.
4. **Growing pressure for extraction.** On 24 April 2025, the White House issued an Executive Order (**‘Unleashing America’s Offshore Critical Minerals and Resources’**) directing Administrator of the US

¹ D. Andrade, “The Mysteries of the Abyss: Understanding Ecosystem Dynamics in Deep-Sea Habitats”, *Journal of Marine Science: Research & Development*, vol. 14, issue 5, 2024, p. 473.

² See, for instance, D.J. Amon, S. Gollner, T. Morato et al., “Assessment of Scientific Gaps Related to the Effective Environmental Management of DSM”, *Marine Policy*, 138, 2022, 105006.

³ See, for instance, B. Hitchin, S. Smith, K. Kröger et al., “Thresholds in DSM: A Primer for Their Development”, *Marine Policy*, 149, 2023, p. 105505.

⁴ EASAC, “Deep-Sea Mining: Assessing Evidence on Future Needs and Environmental Impacts”, 2023, report. <https://easac.eu/publications/details/deep-sea-mining-assessing-evidence-on-future-needs-and-environmental-impacts> ; D. O. B. Jones, M. B. Arias, L. Van Audenhaege et al., “Long-term impact and biological recovery in a deep-sea mining track”, *Nature*, 642, 2025, pp. 112-118 ; J. Alger, “The false promise of deep-sea mining”, *Ocean Sustainability*, 4, 2025 ; J. Hein, P. Madureira, M. Bebianno, et al., “Changes in seabed mining” in *United Nations, The Second World Ocean Assessment*, 2021, p. 820.

⁵ UNCLOS, Article 136.

⁶ UNCLOS, Article 137.

⁷ ISA Secretariat: “Draft regulations on exploitation of Mineral resources in the Area: Draft indicative list of outstanding issues”, 10 February 2026. <https://isa.org/im/wp-content/uploads/2026/02/Draft-indicative-list-of-outstanding-issues.pdf>

National Oceanographic and Atmospheric Administration ('NOAA') to “*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*”⁸ ('DSHMRA'). Quickly thereafter, the Canadian DSM company 'The Metals Company' ('TMC'), announced that it had submitted applications to the NOAA for exploration licenses for polymetallic nodules in the Clarion-Clipperton Zone through its US subsidiary. In January 2026, TMC submitted a consolidated application under the new NOAA regulations, which now may allow license-holders to fast-track their exploration phase in order to expedite mineral exploitation. The application was deemed "fully compliant" by NOAA and TMC expects it to be awarded during Q1 2027.⁹ The US plans for allowing to mine in the Area have been largely condemned for violating international law.¹⁰

Several nations, including China, Japan and the US, are also advancing plans for DSM *within their own jurisdictions*, that is, their exclusive economic zones ('EEZ') and continental shelves.

5. **The moratorium.** Reflecting the scientific uncertainties and governance challenges, 41 countries have publicly supported a global ban, moratorium or precautionary pause to DSM.¹¹ Several international organisations and conventions, such as the Conference of the Parties to the Convention on Biological Diversity, has also called for a moratorium on seabed mining and encouraged its contracting parties to pursue a moratorium at the ISA until seabed mining impacts and risks are better understood.¹²
6. **Aim of the study.** This legal study examines as per request by Seas At Risk and ClientEarth whether the EU could adopt a secondary law instrument¹³ prohibiting the placing on the EU market of minerals extracted through DSM ('the Prohibition'), whether conducted in the Area (seabed beyond national jurisdiction) or within national jurisdiction .
7. **DSM scenarios.** For the purpose of this study, four scenarios of exploitation of the deep sea shall be distinguished:
 - i) minerals extracted in the Area without authorisation from the ISA;
 - ii) minerals extracted in the Area pursuant to an ISA authorisation (i.e. in the event of the adoption of a Mining Code);
 - iii) minerals extracted within the national jurisdiction of non-EU States, pursuant to a national license;

⁸ Executive Order, sec 3(a)(i).

⁹ TMC, "TMC Provides First Quarter 2026 Corporate Update". May 14, 2026. <https://investors.metals.co/news-releases/news-release-details/tmc-provides-first-quarter-2026-corporate-update/>

¹⁰ Although the US has not ratified UNCLOS, it has signed it and is therefore obliged under the Vienna Convention on the Law of Treaties (VCLT) not to defeat its object and purpose (Article 18). The US is also bound by customary international law applicable to DSM activities, which include relevant rules from the law of the sea, beyond UNCLOS, and from international environment law. Furthermore, the US has itself recognised on multiple occasions the customary nature of the relevant UNCLOS provisions, including through its own domestic legislation – the Deep Seabed Hard Mineral Resources Act – which expressly provides that US jurisdiction over DSM activities is exercised in accordance with generally accepted principles of international law.

See for instance C. Lathrop, "The Latest Trump Threat to International Law: Unilaterally Mining the Area", *EJIL* talks, 2025. <https://www.ejiltalk.org/the-latest-trump-threat-to-international-law-unilaterally-mining-the-area/> and S. Trevisanut, "Expert Opinion An International Law Appraisal of the Executive Order 'Unleashing America's Offshore Critical Minerals and Resources'", 2025, <https://www.greenpeace.org/static/planet4-international-stateless/2025/07/23f80a18-expert-opinion-prof.-dr.-trevisanut-final.pdf>

¹¹ Deep Sea Conservation Coalition, "Momentum for a moratorium" (2026). <https://deep-sea-conservation.org/solutions/no-deep-sea-mining/momentum-for-a-moratorium/>

¹² Decision 15/24 adopted by the Conference of the Parties to the Convention on Biological Diversity, 19 December 2022.

¹³ Regulation, Directive or Decision.

- iv) minerals extracted within the national jurisdiction of EU Member States, pursuant to a national license.

8. Scope. The material scope of the Prohibition includes minerals extracted through scenarios (i)–(iv) as well as minerals extracted through scenarios (i)–(iv) that have been processed, refined or incorporated into downstream products.

9. Questions addressed. This study seeks to provide legal foundation for subsequent discussions with policymakers, legal experts, NGOs and other stakeholders, by addressing the following questions:

- i) Can the EU adopt the Prohibition without exceeding its competence under the Treaties and/or infringing general principles of **European Union** ('EU' or 'Union') **law**, including conferral, subsidiarity and proportionality? Which specific legal bases could support the Prohibition, and what procedural requirements and constraints would apply to its adoption under EU law?
- ii) Would such a Prohibition be compatible with the EU's obligations under **international trade law**, and, if challenged, under what conditions could it be justified?

I. Justification

A. Obligations and policy objectives under international and EU law

10. Applying the precautionary principle. Various international organisations, states, financial institutions, legal scholars and UN Special Rapporteurs have expressed concerns that authorising DSM under the current conditions may be inconsistent with international law. In particular, they point to the precautionary principle, embedded in both customary international law and the practice of ISA, and the general obligation to preserve the marine environment established at Article 145 of UNCLOS and in the Agreement on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction ('**BBNJ Agreement**')¹⁴. The Advisory Opinion of the International Tribunal for the Law of the Sea ('**ITLOS**') of 21 May 2024¹⁵ provides authoritative judicial support for this view, confirming that the precautionary approach imposes a stringent standard of due diligence on States where harm to the marine environment is foreseeable, a standard that is all the more stringent where, as in the context of DSM, that harm may be serious and irreversible.¹⁶ Read in conjunction with the

¹⁴ T. Fisher, Z. Douglas KC, T. B. Heather-Latu and J. Jones, "In the Matter of a Proposed Moratorium or Precautionary Pause on Deep-Sea Mining Beyond National Jurisdiction", *Legal Opinion*, 10 February 2023. See also A. Jaeckel, *The International Seabed Authority and the Precautionary Principle. Balancing Deep Seabed Mineral Mining and Marine Environment Protection*, Brill, 2017 ; V. T. Campanella, *Routledge Handbook of Seabed Mining and the Law of the Sea*, Routledge, 2024 ; P. Singh and A. Jaeckel, "Ownership in the Deep Seas – Undermining by Mining? Deep Seabed Mining in Light of International Environmental Law", *American Journal of International Law*, vol. 118, 2024 ; P. Singh, A. Jaeckel and J. A. Ardron, "A Pause or Moratorium for Deep Seabed Mining in the Area? The Legal Basis, Potential Pathways, and Possible Policy Implications", *Ocean Development & International Law*, vol. 56, issue 1, 2025, pp. 18-44 and A. P. Riaño and E. Morgera, "The Precautionary Principle and Deep-Seabed Mining: A State obligation under international law that must be urgently respected", *United Nations Human Rights Council – Policy Brief*, May 2025.

¹⁵ ITLOS, Advisory Opinion of 21 May 2024.

¹⁶ The International Court of Justice's advisory opinion issued on 23 July 2025 ('*Obligations of States with respect to Climate Change*') also contains findings that may contribute to holding States accountable should they proceed with DSM activities in the absence of an agreed Mining Code and ISA authorisations. See also C. Robertson & E. Stoegeher, "Four Key Takeaways for Deep Sea Mining from the ICJ Advisory Opinion", *EJIL! Talk*. September 2025, <https://www.ejiltalk.org/four-key-takeaways-for-deep-sea-mining-from-the-icj-advisory-opinion/>

Tribunal's earlier Advisory Opinion on Activities in the Area¹⁷, this jurisprudence strongly supports the view that authorising DSM in the current state of scientific knowledge would fall short of the standard required under international marine environmental law.

11. EU environmental law on the precautionary principle. Enshrined in article 191(2) of the Treaty on the Functioning of the European Union ('**TFEU**'), the precautionary principle forms part of EU primary law. Read in conjunction with Article 3(3) of the Treaty of the European Union ('**TEU**') TEU, Article 11 TFEU and Article 37 EU Charter of Fundamental Rights ('**CFR**') – all of which reinforce the requirement of high environmental protection¹⁸ – it forms part of the constitutional architecture governing EU action across all policy areas.

In broad terms, the Court of Justice of the EU ('**CJEU**') held that, where there is scientific uncertainty as to the existence or extent of risks to the environment, the precautionary principle allows – or may impose – the adoption of precautionary measures without having to wait until the reality and seriousness of those risks become fully apparent. In its 2000 Communication on the precautionary principle, the European Commission has emphasised that scientific uncertainty can arise from controversy regarding existing data but also in the absence of relevant data.¹⁹ The Court's recent case-law confirms that the precautionary principle constitutes a legally operative standard structuring administrative and legislative decision-making, capable of either precluding the authorisation of a project or activity, or requiring the EU and its Member States to adopt protective measures in the light of potentially harmful and irreversible environmental risks.²⁰

Complementing the precautionary principle, the prevention principle – also grounded in Article 191(2) TFEU – imposes on EU authorities a duty to act proactively and address environmental harm at source rather than remedying it after the fact. In the context of DSM, where the risks of serious and potentially irreversible harm to marine ecosystems are well-documented, both principles point in the same direction: the EU is not merely entitled, but may be required, to take measures preventing its market from contributing to such harm.²¹

12. The EU's external action general objectives and principles. The Lisbon Treaty placed the specific EU external trade policy into the larger framework of the EU's general external policy objectives, values and principles.²² By stipulating that the Common Commercial Policy ('**CCP**') shall be conducted in the

¹⁷ ITLOS, Advisory Opinion of 1 February 2011.

¹⁸ Article 191(2) provides the objectives of the EU's environmental policy. In addition, the Treaties contain many other references to the environment and the EU's aims and responsibilities in that context. Article 3(3) TEU specifies that one of the general objectives of the EU is to fix a high level of protection and improvement of the environment. Article 37 CFR lays down that "*a high level of environment protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development*". This latter 'integration obligation' is repeated in Article 11 TFEU. Some specific Treaty provisions in other policy areas echo this horizontal commitment to the environment, such as Article 21 TEU on the EU's external action or Article 114(3) TFEU on the internal market policy. See CJEU, 19 January 2023, C-162/21. See also D. Misonne, "High level of protection of the environment", in *OUP Online Encyclopedia of EU law*, Oxford University Press, 2023.

¹⁹ Commission of the European Communities, "Communication from the Commission on the Precautionary Principle", 2000.

²⁰ See e.g., CJEU, 11 July 2024, C-601/22, para. 64; 29 July 2024, C-436/22, para. 72 and 73 ; 6 May 2021, C-499/18, para 80.

²¹ See also C. Henet and A. Meeùs, "Do EU Law and the Precautionary Principle Have Anything to Say on Deep-Sea Mining in the Area? A Potential Additional Normative Layer for the EU and its Member States", *EU Law Live*, 24 March 2026.

²² TEU Article 3(5) uses the terms "values and interests", TEU Article 21 talks about "objectives" and other Treaty provisions refer to the notions as "objectives and principles". However, EU law scholars warn against any attempt to draw conclusions regarding the effects of these concepts from these terminological differences (see, for instance, E. Cannizzaro, "Chapter 1. The Value of the EU International Values", in W. Th. Douma et al. (eds.), *The Evolving Nature of EU External Relations Law*, T.M.C. Asser Press, 2021, p. 5).

context of these general external policy objectives and principles, the Lisbon Treaty expanded the objectives and principles guiding the CCP.²³

Articles 205 and 207(1) TFEU explicitly require the EU trade policy to contribute to the general external policy objectives and principles, rather than solely focusing on world trade development and the reduction of trade barriers. The second sentence of Article 207(1) TFEU states that the CCP “*shall be conducted in the context of the principles and objectives of the Union’s external action*”. Article 205 TFEU stipulates that EU external actions – including the CCP – “*shall be guided by the principles, pursue the objectives and conducted in accordance with the general provisions laid down*” in Chapter 1 of Title V TEU (entitled ‘General Provisions on the Union’s External Action’). The general principles and objectives of the EU’s external action are detailed in Article 21, paragraphs 1 and 2, TEU. As stated in Article 21(2) TUE, they relate *inter alia* to sustainable development linked to preservation and improvement of the quality of the environment and the sustainable management of global natural resources.²⁴

Account must also be taken of Article 11 TFEU, which provides that environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development.

13. Binding obligations on sectoral integration. Articles 3(5) and 21 TEU use strong language (*‘shall’*), indicating that the general principles and objectives of the EU’s external policy are binding. While Article 207(1) TFEU simply requires the Union’s trade policy to be conducted in the context of the general principles and objectives, Article 205 TFEU reinforces their obligatory nature within the framework established by the Treaties.

There is broad consensus among commentators that the general external policy objectives and principles of the TEU bind the EU when conducting its external trade policy.²⁵ The binding nature of these objectives was further clarified in *Opinion 2/15*. In this opinion, the CJEU explicitly declared that integrating the general principles and objectives into the EU’s trade policy is mandatory.²⁶ This obligation, the Court explained, arises from the second sentence of Article 207(1) TFEU, read in conjunction with Article 21(3) TEU and Article 205 TFEU.²⁷

14. Internal market measure on DSM. In light of the foregoing, both international law and EU law converge in requiring a high level of environmental protection in relation to DSM, particularly in situations characterised by a high level of scientific uncertainty and significant risks of serious or irreversible harm.

²³ See also M. Krajewski, “External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?”, *Common Market Law Review*, vol. 42, 2005, p. 107.

²⁴ Furthermore, TEU Article 21(2)(e) specifies that the EU’s external action should strive to “*encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade*”. TEU Article 3(5) adds that “*in its relations with the wider world the Union shall uphold and promote its values and interests (...) It shall contribute to (...) the sustainable development of the Earth, (...) free and fair trade, (...) as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter*”.

²⁵ See, for instance, Ch. Beaucillon, “Opinion 2/15: Sustainable Is the New Trade. Rethinking Coherence for the New Common Commercial Policy”, *European Papers*, vol. 2, n° 3, p. 822 ; M. Krajewski, “The Reform of the Common Commercial Policy”, *op.cit.*, p. 297 or S. Velluti, *op. cit.*, p. 48. See also L. Bartels, “The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects”, *The European Journal of International Law*, vol. 25, nr. 4, 2015, p. 1074 and P.-C. Müller-Graff, “The Common Commercial Policy enhanced by the Reform Treaty of Lisbon?”, in A. Dashwood and M. Maresceau (eds.), *Law and Practice of EU External Relations*, Cambridge University Press, 2008, pp. 188-201.

²⁶ CJEU, *Opinion 2/15*, 16 May 2017, para. 143. See also CJEU, *Air Transport Association of America and others v. Secretary of State for Energy and Climate Change*, 21 December 2011, C-366/10, para. 101.

²⁷ CJEU, *Opinion 2/15*, 16 May 2017, para. 143.

Under UNCLOS, the obligations to protect and preserve the marine environment and to organise and manage activities for the benefit of humankind, read in conjunction with the precautionary principle, may preclude the authorisation of DSM activities in the absence of sufficient scientific knowledge and safeguards.²⁸ Within the EU legal order, the precautionary principle enshrined in Article 191(2) TFEU, read together with Articles 3(3) TEU, 11 TFEU and 37 CFR, forms part of the Union's constitutional framework and may justify the adoption of preventive measures in the face of uncertain but potentially serious or irreversible environmental risks. In addition, the general objectives of the Union's external action require the EU to contribute to sustainable development, the protection of global natural resources and the observance of international law.

Taken together, the EU may be required, or at least is entitled, to ensure that its internal market and external economic relations do not contribute to environmentally harmful activities with severe and irreversible impacts, such as DSM. This conclusion is further reinforced by the requirement of consistency between EU external action and internal policy under Article 21(3) TEU, and by the designation of the Area and its resources as the common heritage of humankind under Article 136 UNCLOS, which provides an independent normative foundation for Union action. Accordingly, a measure prohibiting the placing of DSM-derived minerals on the EU market may be understood as giving effect to these converging obligations under both international and EU law.

15. Unilateral mining. Minerals extracted through DSM conducted under unilateral authorisations outside the ISA framework raise an additional distinct legal issue. As mentioned, the Area and its resources are designated as the common heritage of humankind under Article 136 UNCLOS, and the exclusive mandate of the ISA to administer those resources on behalf of humankind is widely regarded as reflecting customary international law binding on all States, including those that have not ratified UNCLOS.²⁹ Article 137(2) UNCLOS provides that all rights in the resources of the Area are vested in humankind as a whole, on whose behalf the ISA acts, and that minerals recovered from the Area may only be alienated in accordance with Part XI and the ISA's rules and procedures. Unilateral licensing therefore purports to alienate rights that belong to humankind collectively. Article 137(3) further provides that no State, natural or juridical person shall claim, acquire or exercise rights with respect to minerals recovered from the Area except in accordance with Part XI. Article 138 additionally requires that the general conduct of States in relation to the Area be consistent with the Charter of the United Nations and other rules of international law, thereby providing a further basis for the conclusion that unilateral licensing is incompatible with the international legal order governing the Area.

The 1994 Agreement was adopted with the specific object and purpose of establishing a universal common management regime for the Area, capable of attracting the participation of all major industrialised States. Unilateral licensing of DSM activities outside this framework directly undermines that object and purpose. Therefore, unilateral licensing of DSM activities in the Area has been widely criticised as incompatible with international law³⁰.

Importantly, these developments also engage the obligations of UNCLOS State parties directly. Reading Article 137(3) jointly with Article 139(1) UNCLOS, it can be argued that State parties are required to prevent their nationals from acquiring or reselling minerals recovered from the Area in

²⁸ T. Fisher, Z. Douglas KC, T. B. Heather-Latu and J. Jones, "In the Matter of a Proposed Moratorium or Precautionary Pause on Deep-Sea Mining Beyond National Jurisdiction", *Legal Opinion*, 10 February 2023

²⁹ J. Dingwall, "Preventing Unilateral Deep Seabed Mining Activities – To What Extent Does the UNCLOS Regime Constrain External Actors?", in *International Law and Corporate Actors in Deep Seabed Mining*, Oxford University Press, 2021, 150–196.

³⁰ C. Lathrop, "The Latest Trump Threat to International Law: Unilaterally Mining the Area", *EJIL* talks, 2025. and S. Trevisanut, "Expert Opinion. An International Law Appraisal of the Executive Order 'Unleashing America's Offshore Critical Minerals and Resources'", 2025.

violation of UNCLOS, and that failure to adopt the necessary measures could render the State party in breach of its own international obligations.³¹ On this reading, the adoption by the EU of a measure excluding unilaterally extracted deep-sea minerals from its market would not only be consistent with UNCLOS but may be required by it.³²

B. EU position regarding DSM

- 16. EU's positions.** EU institutions have since 2016 consistently supported a moratorium or a precautionary pause to DSM and maintained that no commercial exploitation should proceed until the environmental impacts are sufficiently understood, risks are assessed and it can be demonstrated that the marine environment is effectively protected.³³

The most recent position of the European Commission reflecting this position can be found within the European Ocean Pact of 5 June 2025.³⁴ In its response to this pact, the Council of the European Union noted its support to the work *“to establish a sound regulatory regime on potential future deep-sea mining that is based on the precautionary principle as well as on the highest environmental standards and sufficient scientific knowledge, in order to ensure that such activity would not cause harmful effects to the marine environment in the Area, as defined by UNCLOS”*.³⁵

Most recently, in its resolution of 29 April 2026, the European Parliament reiterated its support for a moratorium and added that both the EU and its Member States have a legal obligation to respond to unilateral DSM activities with “appropriate measures”.³⁶

- 17. CRMA.** The Critical Raw Materials Act (**‘CRMA’**)³⁷ further confirms the Union’s cautious approach to the sourcing of raw materials from the deep sea. The CRMA aims to secure a reliable supply of critical raw materials, notably by identifying and supporting strategic projects such as extraction, processing or recycling projects that contribute to the Union’s supply security and meet sustainability standards.

³¹ S. Trevisanut, “Expert Opinion. An International Law Appraisal of the Executive Order ‘Unleashing America’s Offshore Critical Minerals and Resources’”, 2025.

³² André Nollkaemper recently concluded that UNCLOS State parties are under a positive obligation to adopt measures ensuring that operators within their jurisdiction do not give effect to non-conforming claims or dealings in such minerals, and that the absence of such measures may itself constitute a failure to discharge the obligations arising under Articles 137 and 139(1) UNCLOS (“Legal Opinion on the application of Article 137 UNCLOS in the Dutch legal order and the obligations of the Netherlands under Articles 137 and 139(1) UNCLOS in respect of participation of juridical persons in deep-seabed mining outside an ISA mandate”, 5 June 2026). See also S. Trevisanut, “Expert Opinion. An International Law Appraisal of the Executive Order ‘Unleashing America’s Offshore Critical Minerals and Resources’”, 2025; T. Fisher and S. Robb, “Untouchable Metals: How the Obligations of UNCLOS States Parties Limit the Commercial Viability of Unilateral Deep Sea Mining”, EJIL:Talk!, 23 June 2025.

³³ Seas At Risk, “The changing seascape of deep-sea mining in Europe”, Brussels, 2024. https://seas-at-risk.org/wp-content/uploads/2024/09/EU-DSM-Report_September-digital-w-appendix.pdf

³⁴ European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions: The European Ocean Pact”, 2025. <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52025DC0281>

³⁵ Council of the European Union, “Council conclusions on the European Ocean Pact” <https://data.consilium.europa.eu/doc/document/ST-15807-2025-INIT/en/pdf>

³⁶ European Parliament, “European Parliament resolution of 28 April 2026 on the role of ocean diplomacy for the competitiveness of EU fisheries and aquaculture”, 28 April 2026, para. 31 and 32. https://www.europarl.europa.eu/doceo/document/TA-10-2026-0121_EN.html

³⁷ Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) n° 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020.

Recital 18 of the CRMA expressly refers to DSM, providing that, in line with the precautionary principle, DSM projects should not be recognised as strategic projects until the environmental impacts are sufficiently understood, the risks are assessed and technologies are capable of demonstrating that no serious harm will occur. The CRMA reflects a broader EU policy orientation favouring sustainable sourcing and precaution over high-risk extraction in the absence of sufficient scientific knowledge, and confirms that the Union has already acknowledged at legislative level that DSM should not proceed without sufficient scientific certainty.

- 18. Conclusion.** These converging institutional and legislative developments demonstrate that the EU has built a consistent stance on DSM. In light of this consistency, measures regulating or restricting the placing on the Union market of deep-sea minerals would be in continuity with established EU policy and can be regarded as an application of existing legal and policy frameworks.

II. EU Law: Competence and legal basis

A. Principles

- 19. Conferral.** Since the EU possesses only those competences conferred upon it by the Treaties³⁸, an EU act can be validly adopted only if it is based on a legal basis provided for in the Treaties. Such a legal basis may consist of one or more Treaty provisions, depending on the subject matter of the act. Determining the correct legal basis is crucial: first, to ensure that the measure falls within the competences conferred on the Union by the Treaties; and second, because different provisions of the TFEU provide for different legislative procedures. An EU act must therefore indicate the Treaty provision on which it is based. Failing this, it shall be liable to annulment.³⁹ According to the standard formulation put forward by the CJEU, “*the choice of the legal basis for a [Union] measure must rest on objective factors amenable to judicial review*”⁴⁰.
- 20. Methodology.** The determination of the appropriate legal basis involves two exercises. First, it is necessary to define the scope of application of the Treaty article(s) which may serve as possible legal bases and their relationship to each other. Then, it is necessary to look at the provisions and the objectives of the measure at issue to determine under which legal basis it may legitimately be adopted.
- 21. Centre of gravity.** The most important consideration is the main purpose - or the ‘centre of gravity’ - of the measure. The choice of legal basis depends on an assessment of the measure’s primary objective and its immediate effects. If the measure relates principally to a particular field of action and has only incidental effects on other policies, recourse to a single legal basis is sufficient. However, where several inseparably linked objectives coexist, none of which is secondary, the measure must be based on the corresponding multiple legal bases.⁴¹ It is worth noting at the outset that since the ordinary legislative procedure applies to all the potential legal bases following the entry into force of the Lisbon Treaty, the inclusion of such complementary legal bases would not affect the decision-making procedure governing the adoption of the Prohibition.

³⁸ TEU Article 4(1) and 5(2).

³⁹ In cases where the Court annuls a measure because it was adopted on the wrong legal basis, it may declare that the annulled measure remains in force until the institution concerned adopts a new measure on the correct legal basis.

⁴⁰ CJEU, *Commission v. Council*, 1991, C-300/89.

⁴¹ See, for instance, CJEU, *Opinion 2/00*, 6 December 2001, para. 23 ; *Commission v. Council*, 12 December 2002, C-281/01, para. 33-39 and *Commission v. Council*, 22 October 2013, C-137/12, para. 71-72.

B. Application

22. Environmental competence. Since the Prohibition would restrict trade in specific goods for environmental reasons, the Union's competence in the field of environmental policy must first be examined.

Pursuant to Article 4(2)(e) TFEU, the environment is classified as a shared competence of the Union and the Member States. Consequently, by virtue of Article 2(2) TFEU, the EU has the power to legislate and to adopt legally binding acts in the environmental field.

23. A set of objectives. The Union's competence to protect the environment is not defined by reference to a particular subject matter *ratione materiae*, but rather by a set of broad objectives set out in Article 191(1) TFEU : (i) preserving, protecting and improving the quality of the environment, (ii) protecting human health, (iii) prudent and rational utilisation of natural resources, and (iv) promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

24. Environmental competence as the appropriate legal basis. A prohibition on the placing of deep-sea minerals on the EU market could most appropriately be justified on the legal basis set out in Article 192(1) TFEU. Given the potentially severe and irreversible impacts of DSM on marine ecosystems and biodiversity, such a measure would seek to prevent the EU market from contributing to environmentally harmful extraction practices, thereby directly pursuing the objectives set out in Article 191 TFEU. Grounding the Prohibition in environmental competence would moreover better reflect its primary objective, reducing the risk that the measure could be characterised as discriminatory or protectionist in nature, a characterisation that would be more likely if the Prohibition were framed primarily as a trade instrument under Article 207 TFEU.

This interpretation finds support, as a matter of institutional practice, in the Commission's 2021 proposal for a Council Decision on the position to be taken on behalf of the EU at the meetings of the ISA. This proposal explicitly referred to Article 192(1) TFEU as the substantive legal basis, confirming that the governance of DSM was regarded by the Commission primarily through the lens of EU environmental policy⁴². Although the Commission withdrew this proposal in 2025, the withdrawal does not alter the relevance of the legal basis chosen: it reflects an institutional position on the appropriate Treaty foundation for DSM-related measures that remains pertinent to the present analysis.

The BBNJ Agreement, to which the EU is a signatory, provides further support for grounding the measure in Article 192(1) TFEU. The Commission has relied on this article for the proposed BBNJ Directive as the BBNJ Agreement establishes obligations regarding the protection of marine biodiversity beyond national jurisdiction.⁴³ Insofar as the Prohibition would give effect to these obligations by preventing the EU market from contributing to activities that threaten marine biodiversity in the Area, it would pursue one of the objectives expressly listed in Article 191 TFEU.

⁴² See also G. Ardito, "The European Union at the International Seabed Authority: A Question of Competence on the Brink of Deep-Sea Mining", *Maritime Safety and Security Law Journal*, 11/2022.

⁴³ European Commission, "Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction", 2025. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52025PC0173>

25. Illustrations. This approach would not be without precedent in EU legislative practice. The EU Timber Regulation⁴⁴, adopted on the basis of Article 192(1) TFEU, already in 2010 conditioned access to the EU market on compliance with certain environmental and legality requirements applicable in the country of harvest, by prohibiting the placing on the market of illegally harvested timber and timber products. It has since been replaced by the more comprehensive Regulation on deforestation-free products⁴⁵ ('**EUDR**'), equally based on Article 192(1) TFEU. The EUDR operates by conditioning the placing on the EU market, and the export from it, of certain commodities and derived products on compliance with a deforestation-free requirement, verified through a due diligence system. Products that cannot be demonstrated to comply with this requirement are excluded from the EU market. The mechanism is therefore one of market access conditioning based on the environmental characteristics of the production process rather than the intrinsic characteristic of the product – precisely the same logic that would underpin the envisaged Prohibition. The EUDR rests on the premise that combating deforestation and forest degradation contributes directly to the objectives of EU environmental policy, notably the reduction of greenhouse gas emissions, the protection of biodiversity and the sustainable use of natural resources.

The Carbon Border Adjustment Mechanism⁴⁶ ('**CBAM**') and the Ship Recycling Regulation⁴⁷, both based on Article 192(1) TFEU, provide further illustrations. The CBAM conditions access to the EU market on compliance with environmental standards equivalent to those applicable within the Union, regardless of where production takes place, on the grounds that its primary objective is the prevention of carbon leakage rather than the regulation of trade as such. Similarly, the Ship Recycling Regulation conditions the recycling of EU-flagged ships on compliance with environmental standards irrespective of where recycling takes place. Together, these instruments reflect the EU legislature's consistent practice of relying on Article 192(1) TFEU where the primary objective of a measure is environmental protection, even where it produces effects on operators and activities located outside EU territory.

26. Procedure. Following the entry into force of the Lisbon Treaty, pursuant to Article 192(1) TFEU, measures of secondary law aiming at environmental protection must now be adopted in accordance with the ordinary legislative procedure.

27. CCP as a potential additional legal basis. Since the Prohibition would govern trade in specific goods, a question arises as to whether it falls within the scope of the CCP, and should therefore also be based on Article 207 TFEU, which governs EU exclusive competence in that field.

An EU act falls within the CCP – an area of exclusive EU competence– if it relates specifically to trade with third countries, meaning that it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it.⁴⁸ In line with general principles governing the determination

⁴⁴ Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market.

⁴⁵ Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010.

⁴⁶ Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism.

⁴⁷ Regulation (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling and amending Regulation (EC) No 1013/2006 and Directive 2009/16/E.

⁴⁸ It is settled case-law that the mere fact that an EU act, such as an agreement concluded by it, is liable to have implications for trade with one or more third States is not enough for it to be concluded that the act must be classified as falling within the common commercial policy (CCP). (See CJEU, *Opinion 2/15*, 2017, para. 36).

of legal bases under EU primary law, the CJEU focuses on (i) the primary or predominant purpose of the measure in question and (ii) its immediate effects.⁴⁹

Article 207 TFEU, which provides for the core of the CCP, merely refers to a number of activities which fall within the scope of the CCP, among which trade in goods. Both unilateral measures adopted by the Union alone, such as the Prohibition, and international agreements concluded with third countries and international organisations, are covered by Article 207.

28. The CCP and environmental policy. Over the years, disputes between EU institutions have highlighted the various linkages between external trade policy and environmental policy, as well as the resulting difficulties in terms of legal basis determination. Where a measure pursues both environmental objectives and trade-related effects, the CJEU has provided guidance through the centre-of-gravity test. If the environmental objective is predominant and the effects on trade are incidental, the measure may be based on Article 192 TFEU. Conversely, if the primary objective is to regulate trade with third countries, the measure must be based on Article 207 TFEU.

The Court has recognised that environmental legislation may legitimately affect international trade where this is a necessary consequence of pursuing environmental protection objectives. In *Opinion 2/00 concerning the Cartagena Protocol on Biosafety*, the Court concluded that, although the Protocol regulated the cross-border movement of living modified organisms with clear implications for international trade, its essential objective was environmental protection, namely ensuring an adequate level of biosafety⁵⁰. The fact that a measure has repercussions on international trade does not automatically bring it within the scope of the CCP. The decisive question is whether the instrument is principally intended to regulate trade, or whether trade effects arise incidentally from pursuing another policy objective such as environmental protection.

Crucially for the present analysis, in *Commission v Council (C-94/03)*⁵¹, the Court held that where a measure pursues both environmental and trade objectives in an inseparable manner, a dual legal basis combining Article 192 TFEU and Article 207 TFEU may be required. In that case, the Court annulled a Council decision approving the Rotterdam Convention on hazardous chemicals based solely on Article 133 EC (now Article 207 TFEU), holding that Article 175 EC (now Article 192 TFEU) should have been included as well.

Where the environmental objective of the Prohibition is predominant and its trade effects incidental, Article 192(1) TFEU alone would suffice. Should the trade dimension be considered equally significant, the case law of the Court, in particular *Commission v Council (C-94/03)*, confirms that Article 207 TFEU could be added as a complementary legal basis. However, this addition would not affect the applicable legislative procedure.

29. Conflict Minerals Regulation. The Conflict Minerals Regulation, adopted in May 2017, aims to curb the trade in four minerals – tin, tantalum, tungsten and gold – that may finance armed conflict or be

⁴⁹ In *Opinion 2/00*, the Court explains that it is settled case-law that the choice of the legal basis for a measure "does not follow from its author's conviction alone, but must rest on objective factors which are amenable to judicial review. Those factors include in particular the aim and the content of the measure" (6 December 2001, para. 22).

See also, CJEU, *Commission v. Council*, 10 January 2006, C-94/03, para. 34-36 or *Commission v. Council and European Parliament*, 8 September 2009, C-411/06, para. 45-47 ; *Commission v. Council (Philippines)*, 11 June 2014, C-377/12, para. 34 and *Commission v. Council (Kazakhstan)*, 4 September 2018, C-244/17, para. 36-38.

⁵⁰ CJEU, *Opinion 2/00*, 6 December 2001, para. 34-37.

⁵¹ CJEU, *Commission v. Council*, 10 January 2006, C-94/03.

mined using forced labour.⁵² It seeks to prevent conflict minerals from entering the EU market by requiring EU companies in the supply chain to ensure that these minerals and metals are sourced responsibly and from conflict-free areas. The Regulation is based on Article 207 TFEU, which governs the CCP.

At first sight, this instrument may appear comparable to the envisaged Prohibition, since both measures affect trade in minerals placed on the EU market. However, a significant distinction must be drawn. Unlike environmental protection, which constitutes a specific and autonomous policy objective of the Union under Article 191 TFEU with its own dedicated legal basis in Article 192 TFEU, the security and human rights concerns underlying the Conflict Minerals Regulation do not benefit from an equivalent standalone competence. This distinction in Treaty architecture may explain why, notwithstanding the similar due diligence mechanism used in both instruments, the Conflict Minerals Regulation was grounded in the CCP as the closest available legal basis for addressing security and human rights concerns in the context of international trade flows, while a measure pursuing primarily environmental protection objectives – such as the Prohibition – would more appropriately rely on Article 192 TFEU.

30. Extraterritoriality. A related question concerns the territorial reach of the Prohibition, given that DSM exploitation activities would take place mostly in the Area, outside EU territory. In *Air Transport Association of America*⁵³, the CJEU confirmed that the application of EU environmental legislation cannot be called into question because the activities contributing to environmental harm occur partly outside the territory of the Member States. The Court upheld the application of the EU Emissions Trading Scheme to flights operated by non-EU airlines on the grounds that those flights landed at or departed from EU airports, thereby establishing a sufficient territorial connection with the Union. By analogy, the Prohibition would not regulate DSM activities as such, but rather conditions access to the EU market on compliance with EU environmental standards, regardless of where the underlying extraction took place.

31. Internal market competence. In addition to environmental policy and the CCP, the envisaged Prohibition may also relate to the functioning of the internal market, insofar as it regulates the conditions under which certain products may be placed on the EU market. In this respect, the measure could also rely on Article 114 TFEU, which empowers the Union to adopt measures aimed at ensuring the proper functioning of the internal market, while simultaneously pursuing a high level of environmental protection. Legislative initiatives adopted on the basis of Article 114 TFEU include, for instance, the Regulation prohibiting products made with forced labour on the Union market (**'Forced Labour Regulation'**)⁵⁴ and the CRMA. In these cases, the Union legislature justified the use of Article 114 by emphasising the need to prevent fragmentation of the internal market arising from uncoordinated national measures. In particular, the Forced Labour Regulation was intended to avoid obstacles to the free movement of goods that could result from divergent national legislation prohibiting products made with forced labour.

By contrast, the envisaged Prohibition would not primarily aim to prevent regulatory fragmentation within the internal market. Rather, its primary objective would be environmental protection by preventing the EU market from contributing to environmentally harmful DSM activities. Any effects of the Prohibition on trade and on the functioning of the internal market would therefore arise as a consequence of

⁵² Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas. https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv:OJ.L_.2017.130.01.0001.01.ENG

⁵³ CJEU, *Air Transport Association of America*, 21 December 2011, para. 129.

⁵⁴ Regulation (EU) 2024/3015 of the European Parliament and of the Council of 27 November 2024 on prohibiting products made with forced labour on the Union market and amending Directive (EU) 2019/1937.

pursuing that environmental objective, rather than constituting the measure's central purpose. In light of the centre-of-gravity test developed in the Court's case law, Article 192(1) TFEU therefore appears to be the most appropriate legal basis for the adoption of the measure.

- 32. Subsidiarity.** Since environmental policy is not an exclusive EU competence, the principle of subsidiarity enshrined in Article 5(3) TEU applies. EU legislative action must satisfy two tests. First, the EU institutions must demonstrate that the objectives of the proposed action cannot be sufficiently achieved by the Member States 'either at central level or at regional and local level' (necessity test). Second, they must show that the proposed action, by reason of its scale or its effects, 'can be better achieved at Union level' (added value test).

With respect to the necessity test, individual Member State action would be inherently insufficient. A Member State prohibiting deep-sea minerals on its national market would create only a partial barrier, since those minerals could continue to enter the EU through other Member States. The effectiveness of the measure therefore depends, by definition, on its uniform application across the entire internal market.

With respect to the added value test, Union action would ensure a level playing field for all operators, prevent regulatory arbitrage between Member States, and provide the legal certainty required for effective supply chain regulation. In the absence of a uniform EU measure, divergent national restrictions would fragment the internal market, generate competitive distortions, and ultimately prove ineffective given the global nature of mineral supply chains in which deep-sea minerals are extracted, processed and traded across multiple jurisdictions before reaching the EU market. Action at Union level is therefore not only preferable but necessary to ensure the coherence and effectiveness of the measure.

- 33. Proportionality.** As a general principle governing the exercise of all Union competences pursuant to Article 5(4) TEU, proportionality requires that the content and form of any EU measure do not exceed what is necessary to achieve the objectives of the Treaties.⁵⁵ In the present context, this assessment must take account of the range of available regulatory instruments, including less restrictive measures such as labelling requirements, due diligence obligations and conditional market access regimes. However, the suitability of such measures is limited in the specific context of DSM.

First, such approaches presuppose the existence of clear, verifiable and enforceable sustainability or legality standards. This condition is not met in a consistent manner across all potential sources of deep-sea minerals, since activities may occur both within national jurisdiction and in areas beyond national jurisdiction, governed by distinct and uneven regulatory frameworks. As previously pointed out, any exploitation activities in the Area are subject to a currently non-existent mining code, while exploitation within national jurisdiction falls under domestic licensing systems which may come with various regulatory standards if they would be employed in the absence of an ISA mining code.⁵⁶ This regulatory fragmentation makes it highly difficult, if not impossible, to define a uniform EU compliance benchmark for market access conditions.

Second, while transparency-based instruments solely may improve traceability, they do not prevent market participation in products originating from regulatory systems that permit extraction under low

⁵⁵ CJEU, *Fedesa*, C-331/88, 13 November 1990, para. 13 ; *British American Tobacco*, C-491/01, 10 December 2002, para. 123.

⁵⁶ K. Kröger, et al, "The legal landscape for deep-sea mining in the Area: A primer for practitioners". *Elementa: Science of the Anthropocene* (2025) 13 (1): 00072.

environmental standards, nor do they eliminate the risk of contributing to activities that may be incompatible with the Union's environmental objectives or under international law.

Third, the precautionary principle, as applied by the CJEU, expressly permits the adoption of protective measures proportionate to the level of risk even in the absence of full scientific certainty, provided that the measures are not maintained beyond what is necessary once the uncertainty is resolved. A prohibition subject to periodic review in light of scientific developments and the adoption of a Mining Code or any domestic framework capable of ensuring a level of environmental protection equivalent to that required under Union law would therefore satisfy this requirement.

- 34. The Mining Code.** The ongoing negotiations within the ISA do not preclude the Union from exercising its competence to regulate access to its market. While the ISA seeks to establish a regulatory framework for exploitation activities in the Area, considerable uncertainty remains regarding both the timing and content of any future regime. Key issues remain unresolved, including provisions relating to environmental protection, monitoring, compliance and enforcement.⁵⁷ With the current scientific uncertainty and the lack of environmental thresholds, an early adoption of a Mining Code cannot be assumed to provide a level of environmental protection equivalent to that required under Union law. The mere existence of an ISA authorisation would not, in itself, automatically ensure compliance with Union law requirements applicable to market access, in particular as regards the level of environmental protection required under Article 191(2) TFEU and the precautionary principle.
- 35. Conclusion.** In light of the foregoing considerations, the adoption of the Prohibition could most appropriately be framed as a measure of environmental policy adopted on the basis of Article 192(1) TFEU. This choice best reflects the primary objective and centre of gravity of the measure – namely the prevention of severe and potentially irreversible environmental harm associated with DSM activities – and is further reinforced by the precautionary principle enshrined in Article 191(2) TFEU. Framing the Prohibition as an environmental measure would moreover not alter the applicable legislative procedure, since the ordinary legislative procedure applies equally to measures adopted under the CCP or the internal market competence. It would also reduce the risk that the Prohibition could be characterised as a discriminatory trade measure, and, as examined in the next chapter, is likely to strengthen its legal defensibility under international trade law.

In any event, should it be considered necessary to reflect the measure's external trade or internal market dimension, Article 207 TFEU or Article 114 TFEU could, where appropriate, be relied upon as additional legal bases.

III. Compatibility with WTO law

- 36. Non-discrimination.** From a legal perspective, compatibility with the World Trade Organisation ('WTO') regulations is often portrayed as a major obstacle to unilateral trade measures addressing global environmental challenges as it aims to facilitate trade by reducing barriers. Nevertheless, WTO case law is nuanced. It indicates that such measures, including those based on environmental process and production methods ('PPMs'), is, under certain circumstances, consistent with WTO law.

⁵⁷ ISA Secretariat: "Draft regulations on exploitation of Mineral resources in the Area: Draft indicative list of outstanding issues", ISA, ISBA/31/C/CRP.4 10 February 2026. <https://isa.org.im/wp-content/uploads/2026/02/Draft-indicative-list-of-outstanding-issues.pdf>

While EU law generally regulates the characteristics of products placed on its market in a non-discriminatory manner, environmental regulation frequently targets non-product-related PPMs⁵⁸. Such measures do not affect the physical characteristics of products but address environmental externalities generated during production. When applied to imported goods, they condition access to the EU market on compliance with production standards applied abroad and may therefore raise issues under international trade agreements.

Against this background, the present section assesses the WTO legality of the proposed Prohibition. As a measure adopted by a WTO Member (namely, the EU) prohibiting the placing on the EU market of certain products on account of the environmental impact of their production process, the Prohibition must comply with the obligations arising under the relevant WTO Agreements.

Any inconsistency could expose the EU to State-State dispute-settlement proceedings before the WTO judiciary⁵⁹ and may also be invoked, albeit indirectly, before the CJEU⁶⁰.

37. The Prohibition as a non-product-related PPM. It should be noted that at the stage of raw extraction, deep-sea minerals may display specific physical and mineralogical characteristics that differentiate them from terrestrially mined equivalents. However, these distinctions are progressively lost during processing and refining⁶¹, such that, at the stage at which such materials are placed on the EU market – both as downstream products and in the form of processed metals or chemical compounds (e.g. nickel or cobalt derivatives) – they are physically indistinguishable from minerals extracted through terrestrial mining, as they are intended to serve the same areas of application. The envisaged Prohibition would therefore not be based on intrinsic product characteristics, but on the environmental impact of the production process, and should accordingly be regarded as a measure targeting non-product-related PPMs.

38. GATT and TBT Agreement. The legality of the Prohibition may be examined under both the General Agreement on Tariffs and Trade (**'GATT'**) and the Agreement on Technical Barriers to Trade (**'TBT agreement'**). While these agreements are not mutually exclusive and must be interpreted in a coherent and consistent manner⁶², the applicability of the TBT Agreement appears uncertain.

According to the Appellate Body (**'AB'**) in *EC – Seal Products*, in order to determine whether a measure lays down “related” processes and production methods (PPMs), it is necessary to assess whether the prescribed PPMs “*have a sufficient nexus to the characteristics of a product in order to be considered*

⁵⁸ NPR-PPMs are measures that regulate the conditions under which products are produced rather than the products themselves. The product is physically identical to a compliant one, but its production process is not - as is the case, for instance, for timber logged through deforestation or minerals extracted through environmentally harmful methods. NPR-PPMs are to be distinguished from product-related PPMs ('PR-PPMs'), which concern production methods that affect the physical characteristics of the final product and are generally less controversial under WTO law.

⁵⁹ The WTO dispute settlement system operates exclusively on a State-to-State basis: only WTO Members may bring a claim, and private parties have no standing. Disputes are initiated through consultations, followed—if unresolved—by the establishment of a panel to examine the matter. Panel reports may be appealed on issues of law to the Appellate Body (although the Appellate Body has been non-functioning since December 2019). Once adopted by the Dispute Settlement Body (**DSB**), panel and Appellate Body (**AB**) reports become binding on the parties to the dispute. If a Member fails to comply with the recommendations and rulings within a reasonable period of time, the prevailing Member may seek authorisation from the DSB to impose retaliatory measures, typically in the form of the suspension of concessions.

⁶⁰ CJEU, *Commission v. Hungary (Central European University)*, Case C-66/18.

⁶¹ See, for instance, X. Wang, W. Qin, M. Li, X. Liu, Y. Cheng, S. Chen and C. Yang, “Mineralogy of Deep-Sea Manganese Nodules and Advances in Extraction Technology of Valuable Elements from Manganese Nodules”, *Metals*, vo. 14, issue 12, 2024, p. 1359. <https://doi.org/10.3390/met14121359>

⁶² AB Report, *United States – Measures affecting the production and sale of clove cigarettes ('US – Clove Cigarettes')*, 4 April 2012, para. 91.

related to those characteristics”⁶³. This suggests that the TBT Agreement applies only where the relevant PPMs bear a sufficiently close relationship to the intrinsic characteristics of the product.

As deep-sea minerals are physically indistinguishable from those extracted through terrestrial mining when placed on the market as end-use products, the required nexus between the production method and the product’s characteristics is therefore unlikely to be satisfied. Accordingly, the applicability of the TBT Agreement to the Prohibition is doubtful. The present analysis therefore focuses on the GATT framework, whose disciplines are, in any event, broadly comparable in respect of non-discrimination.

A. GATT disciplines

39. GATT 1994. The overarching obligations and rights concerning trade in goods are set out in the GATT 1994.⁶⁴ The rationale of these rules is to facilitate open trade by reducing barriers. Measures adopted by WTO members that prohibit the placing on their market of products due to the environmental impact of their production process are likely to restrict imports from third countries and must therefore comply with GATT rules.

40. The first test. The first step in assessing the legality of a measure affecting trade in goods, such as the Prohibition, is whether it falls under the scope of the GATT. This is the case where a measure is:

- discriminatory, meaning that it is either covered by Article I on most-favoured nation (MFN) treatment (which requires that products from one WTO Member must be treated no less favourably than the like products from any other country); or Article III on national treatment (according to which imported products cannot be treated less favourably than domestic like products); or
- a quantitative restriction which limits the quantity of product being imported or exported (Article XI).⁶⁵

41. Non-discrimination. A measure is discriminatory where it entails either *de jure* discrimination, when it expressly differentiates between like products on grounds of origins; or *de facto* discrimination, when the measure is origin neutral on its face but has a detrimental impact on the conditions of competition between like products originating in different WTO members.

42. National treatment. Applied to the proposed Prohibition, first, a possible breach of the national treatment obligation under GATT Article III:4 could arise if imported deep-sea minerals extracted through DSM are prohibited from being placed on the EU market, while competing minerals extracted terrestrially within the EU (or within the waters of Member States’ national jurisdictions) remain permitted on the EU market. Even if the measure is origin-neutral on its face, it may *de facto* modify the conditions of competition to the detriment of imported deep-sea minerals, provided that deep-sea minerals and

⁶³ AB Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, 22 May 2024, para. 5.12.

⁶⁴ For a comprehensive analysis of these obligations, see for instance D. Bethlehem, D. McRae, R. Neufeld and I. Van Damme (eds.), *Oxford Handbook of International Trade Law*, 2nd ed., Oxford University Press, 2022, in particular Chap. 16 and 17; P. Van den Bossche & W. Zdouc, *The Law and Policy of the World Trade Organization. Text, Cases and Materials*, 5th ed., Cambridge University Press, 2022 or M. Matsushita, Th. Schoenbaum, P. C. Mavroidis and M. Hahn, *The World Trade Organization. Law, Practice, and Policy*, 3rd ed., The Oxford International Law Library, 2015.

⁶⁵ In a number of WTO disputes regarding environmental measures, WTO members imposing bans on the importation of certain products were found to have acted inconsistently with the prohibition of GATT Article XI:1. See, for instance, AB Report, *United States – Import prohibition of certain shrimps and shrimp products*, 6 November 1998; AB Report, *Brazil – Measures affecting imports of retreaded tyres*, 17 December 2007; AB Report, *EC – Seal Products*.

terrestrial minerals are considered “*like products*” within the meaning of WTO case law.⁶⁶ The key legal question would therefore be whether differences in extraction methods are sufficient to render the products “*unlike*” or whether they remain commercially and physically substitutable.

43. Most-favoured-nation. Second, a potential inconsistency with the most-favoured-nation (‘MFN’) obligation under GATT Article I may arise if the prohibition is structured in a differentiated manner. For example, if the EU were to prohibit deep-sea minerals extracted in the Area but not those extracted within national jurisdiction, or if transitional arrangements, licensing recognition, or cooperation mechanisms were granted selectively to specific trading partners, the measure could result in less favourable treatment for ‘like products’ originating in other WTO Members. More generally, as with national treatment, a violation of Article I GATT may arise not only in cases of explicit differentiation, but also where an origin-neutral measure results in *de facto* discrimination. In particular, even if the Prohibition applies irrespective of origin, it may disproportionately affect products originating in countries engaged in DSM activities or dependent on such supply chains, thereby modifying the conditions of competition to their detriment.

44. Differentiation. Similarly, if the EU were to distinguish between deep sea minerals extracted pursuant to an ISA licence (albeit the option does not exist at present) and those extracted without such authorisation under the UNCLOS framework, this differentiation could raise questions under both Articles I and III GATT, insofar as it would result in different treatment of ‘like products’ depending on their regulatory status. It should be noted, however, that not all differentiation is necessarily precluded under WTO law: distinctions based on objective and legally relevant criteria, such as compliance with applicable international legal frameworks, may in principle be capable of justification, provided they are designed and applied in a manner that avoids arbitrary or unjustifiable discrimination. Whether such justification could be established in the present context is examined below in the section on Article XX GATT.

By contrast, a comprehensive prohibition covering all deep-sea minerals – wherever extracted – on the basis that their extraction entails environmentally unsustainable practices in the current state of scientific knowledge, would significantly reduce the risk of discriminatory treatment under Articles I and III GATT.

If the prohibition extends to downstream products incorporating refined deep-sea minerals, questions of competitive relationships would become more complex. The measure could affect imported intermediate and final goods differently depending on their mineral sourcing, potentially altering the competitive balance between imported and domestically produced goods in sectors such as batteries, renewable energy technologies, or electronics.

Against this background, the central issue is whether such a prohibition can be justified under GATT Article XX, in particular paragraphs (b) (protection of human, animal or plant life or health) and/or (g) (conservation of exhaustible natural resources).

45. Quantitative restrictions. In addition to potential inconsistencies with the non-discrimination obligations under Articles I and III GATT, the envisaged Prohibition may also fall within the scope of Article XI:1 GATT, which prohibits quantitative restrictions on imports and exports. This provision has been interpreted broadly in WTO case law as covering not only quotas but also measures that operate as prohibitions or restrictions on importation.

⁶⁶ GATT Article III:4 lays out two-tier test to assess the compatibility of internal regulations, like the Ban (i) whether the imported and domestic products are like products; and (ii) whether the imported products are accorded less favourable treatment than like products of national origin. The analysis under Article III thus involves both a product comparison (likeness) and a treatment comparison (less favourable treatment), forming the core of the national treatment discipline under the GATT.

In the present case, a prohibition on the placing on the EU market of deep-sea minerals would, in substance, amount to an import ban on such products. As such, it would constitute a restriction within the meaning of Article XI:1 GATT, irrespective of whether it is applied in a discriminatory manner. Accordingly, even if the measure were found to comply with Articles I and III GATT, it would still need to be justified under Article XX GATT.

B. Justification

46. General exceptions. Article XX GATT permits deviations from all substantive GATT obligations, including Articles I, III and XI, provided that certain conditions are met. It establishes a two-tier test for determining whether a measure that is prima facie inconsistent with the GATT may nevertheless be justified.

First, the Prohibition must fall within one of the specific exceptions enumerated in paragraphs (a) to (j), listed under Article XX (so-called 'provisional justification'). Secondly, it must comply with the requirements set out in the introductory clause of Article XX, commonly referred to as the 'chapeau', which governs the manner in which the measure is applied. In WTO jurisprudence, the 'chapeau' functions as a safeguard against abuse. It prevents WTO members from invoking exceptions in bad faith or for protectionist purposes.⁶⁷ Accordingly, even a measure that is provisionally justified under one of the listed paragraphs may nevertheless be struck down if applied in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or if it amounts to a disguised restriction on international trade.

47. Relevant general exceptions. Among the exceptions listed in Article XX, three are relevant in the environmental context:

- (b), concerning the protection of human, animal or plant life or health;
- (g), concerning the preservation of exhaustible natural resources; and
- (a), concerning measures necessary to protect public morals.

Subparagraphs (b) and (g) constitute the traditional environmental exceptions under the GATT. However, the AB clarified in *EC – Seal Products* that environmental concerns may also fall within the scope of public morals under Article XX(a).

48. Article XX(b). Article XX(b) may, at first sight, appear as a natural basis to justify a measure aimed at protecting marine biodiversity and ecosystem integrity. To fall within its scope, the measure must be designed to protect human, animal or plant life or health.

WTO case law makes clear that the general references to environmental protection are insufficient. In *Brazil – Measures Affecting Imports of Retreaded Tyres*, the AB emphasised that a Member relying on Article XX(b) must not merely establish risks to the "environment" in the abstract, but also specific risks to human, animal or plant life or health⁶⁸.

In the present context, this would require substantiating the environmental risks of DSM in terms of harm to marine species and ecosystems.

⁶⁷ A. Cassimatis, "Non-trade values, international trade, and abuse of rights", in *Global values and international trade law*, Routledge, 2021, pp. 26-42.

⁶⁸ AB Report, *Brazil – Measures affecting imports of retreaded tyres*, 17 December 2007.

49. Necessity. In addition, the measure must be ‘necessary’ to achieve the chosen level of protection. This involves a structured weighing and balancing of:

- (i) the importance of the interests at stake;
- (ii) the contribution of the measure;
- (iii) and its trade-restrictiveness.⁶⁹

This assessment includes a comparison with reasonably available alternatives. Where less trade-restrictive measures (e.g. labelling, due diligence or certification schemes) could achieve the same level of protection, an outright ban may face closer scrutiny.

Applied to the Prohibition, Article XX(b) could provide a basis for justification, provided that the EU demonstrates both to substantiate, on the basis of credible scientific evidence, the existence of serious risks that DSM poses to marine species and ecosystem integrity, and to articulate those risks in terms of harm to animal or plant life or health. The decisive question would then be whether the prohibition makes a genuine and material contribution to preventing such harm, and whether less trade-restrictive alternatives could achieve the EU’s chosen level of environmental protection with comparable effectiveness.

If the EU can demonstrate that the DSM risks to the environment are significant and concrete; that no scientifically proven mitigation or restoration measures currently exist to counter these risks; and the absence of reasonably available and equally effective alternatives to sourcing critical raw materials, the Prohibition would satisfy the necessity requirement under Article XX(b), subject to compliance with the ‘chapeau’.

50. Article XX(g). Article XX(g) permits measures “*relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption*”. Two cumulative conditions must be satisfied: first, the measure must relate to the conservation of exhaustible natural resources; secondly, it must be applied in conjunction with corresponding domestic restrictions, thereby ensuring even-handedness. Although originally intended to cover mineral or non-living natural resources, the AB adopted an evolutionary interpretation in *US-Shrimp*⁷⁰, holding that the term ‘exhaustible natural resources’ must be read in light of contemporary concerns about environmental protection and the goal of sustainable development as acknowledged in the WTO Agreement’s preamble.

The requirement that a measure “*relates to*” conservation is less demanding than the necessity test under Article XX(b): it is satisfied where the relationship between the measure and the conservation objective is “*real, close and proportionate*”⁷¹.

In the present case, the protection of deep-sea ecosystems, characterised by fragile biodiversity, endemic species and site-specific habitats, can plausibly be framed as the conservation of exhaustible

⁶⁹ Panel Report, *Brazil – Measures affecting imports of retreaded tyres*, 12 June 2007, para. 5.214. In this sense, the necessity test under Article XX(b) functions as a proportionality analysis under international trade law: it requires that the chosen measure be suitable to achieve the intended environmental protection, necessary in the sense that no reasonably available and less trade-restrictive alternative exists, and proportionate in its effects on trade relative to the level of protection sought. A measure that imposes excessive trade restrictions compared to its marginal environmental benefits is unlikely to satisfy the proportionality element embedded in the necessity test.

⁷⁰ AB Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, 6 November 1998.

⁷¹ P. Van den Bossche, *op. cit.*, p. 41. See AB Report, *United States – Standards for reformulated and conventional gasoline*, 29 April 1996, para. 20-21 and AB Report, 12 October 1998, *United States – Import prohibition of certain shrimps and shrimp products*, para. 136. In *US-Shrimp*, the ‘relating to’ requirement under Article XX(g) is defined as “a close and genuine relationship of ends and means”.

natural resources. The Prohibition may therefore fall squarely within the scope of Article XX(g), provided it is applied in an even-handed manner, including through corresponding domestic restrictions.

51. Extraterritoriality. The fact that the environmental harm targeted by the Prohibition may occur largely outside the EU's territory does not preclude reliance on Article XX. WTO jurisprudence does not establish a strict territorial limitation on that provision⁷². In particular, in *US – Shrimp*⁷³, *EC – Seal Products*⁷⁴ and, more recently, *EU – Palm Oil*⁷⁵, adjudicatory bodies accepted that measures addressing environmental concerns arising outside the regulating Member's territory may fall within the scope of Article XX, provided that a sufficient nexus exists between the regulating state's territory and the protected interest.

In the present case, a sufficient nexus can be established on at least two grounds. First, the Area and its resources are designated as the common heritage of humankind under UNCLOS, conferring on all States parties, including the EU, a direct legal interest in the protection of deep-sea ecosystems that goes beyond a mere policy preference. Second, deep-sea ecosystems are ecologically connected to the broader marine environment, including waters adjacent to EU Member States and EU overseas territories, meaning that environmental harm in the Area may have direct consequences for EU marine ecosystems. Taken together, these elements provide a nexus that is at least as strong as that accepted in *US – Shrimp*, and arguably stronger given the EU's treaty-based obligations under UNCLOS. This conclusion is further supported by the reasoning in *EU – Palm Oil*, where the panels accepted a sufficient nexus on the grounds that the environmental concern at issue (namely climate change) was inherently global in nature. The same logic applies with equal force to DSM: the deep sea covers more than 65% of the Earth's surface, plays a critical role in global biogeochemical cycles and climate regulation, and hosts ecosystems whose degradation would have consequences extending far beyond the site of extraction. The protection of deep-sea ecosystems therefore constitutes an inherently global environmental challenge, recognised as such by the international community, and one in which all States, including the EU, have a legitimate interest.

The case law analysed also makes clear that the decisive constraint lies in the application of the measure, rather than in its territorial reach. Measures with extraterritorial elements have consistently been scrutinised under the chapeau of Article XX and have been found inconsistent where they resulted in arbitrary or unjustifiable discrimination, notably due to a lack of flexibility, transparency or even-handedness.

⁷² B. Cooreman, "Article XX, MEAs and extraterritoriality", in *Elgar Encyclopedia of Environmental Law*, vol. XI, 2023, p. 216.

⁷³ AB Report, *United States – Import prohibition of certain shrimps and shrimp products*, 12 October 1998, para. 133. "We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)."

⁷⁴ In *EC-Seal Products*, where the EU invoked the public morals exception to justify an import ban on certain seal products, the AB refers to *US-Shrimp* and the 'sufficient nexus' found in the 'specific circumstances' of that case. The AB then considers the facts before it, noting that the EU Seal Regime was "designed to address seal hunting activities occurring 'within and outside the Community' and the seal welfare concerns of 'citizens and consumers'" in EU member states. That said, as "participants did not address [the] issue [of extraterritoriality] in their submissions on appeal", "while recognizing the systemic importance of the question of whether there is an implied jurisdictional limitation in Article XX(a), and, if so, the nature or extent of that limitation", the AB decided not to further examine this question.

⁷⁵ Following the approach established in *US – Shrimp* and *EC – Seal Products*, the panels assessed whether a sufficient nexus existed between the EU's territory and the activities being regulated. They concluded that such a nexus was satisfied on the grounds that: (i) the measures were concerned with climate change, which is inherently global in nature; (ii) the measures regulated EU demand for crop-based biofuels and addressed the adverse indirect land-use change ('ILUC') impacts that such demand could generate; and (iii) the ILUC-related greenhouse gas emissions targeted by the measures did not exclusively arise outside EU borders and could also occur within EU territory.

52. The chapeau of Article XX. As noted, Article XX establishes a two-tier test. Even where a measure falls within one of the listed exceptions, it must also comply with the requirements of the introductory clause (the “chapeau”). In WTO jurisprudence, the chapeau has proven decisive, particularly in disputes involving environmental measures. Some decisions concerning environmental measures have turned on these requirements. For measures provisionally justified under one of the listed public policy exceptions, the introductory clause imposes:

“the requirement that such measures are not applied in a manner which would constitute a means of *arbitrary or unjustifiable* discrimination between countries where the same conditions prevail, or a *disguised restriction on international trade*.”⁷⁶

Its function is to ensure that the invocation of public policy exceptions does not serve as a pretext for protectionism. As emphasised by the AB in *US – Shrimp*, it embodies the need to maintain a balance between a Member’s right to pursue legitimate policy objectives and the rights of other Members under the GATT. The focus is therefore not solely on the measure, but on its design, architecture and practical application.

53. Arbitrary or unjustifiable discrimination. Pursuant to the chapeau of Article XX, the application of that measure cannot constitute ‘a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail’. As clarified by the AB in *US – Gasoline*⁷⁷, the discrimination examined under the chapeau must differ from that addressed under Articles I and III GATT. It is not any differential treatment that is prohibited, but only discrimination that is arbitrary or unjustifiable in light of the objective pursued and the manner in which it is applied.

WTO case law provides guidance as to when such discrimination arises. In *US – Gasoline*, discrimination was found unjustifiable because it was foreseeable and not merely inadvertent. In *US – Shrimp*, it accepted the legitimacy of the environmental objective but found the measure arbitrarily discriminatory because it imposed a rigid, US-designed regulatory model without sufficient flexibility to account for differing conditions in exporting countries. The key lesson is that WTO Members may not use trade restrictions to compel other Members to adopt essentially identical regulatory approaches, without accommodating equivalent alternatives.

Accordingly, a measure will be less likely to be regarded as arbitrary or unjustifiable where it:

- allows for flexibility in how exporting countries achieve the required level of environmental protection (e.g. recognition of equivalent measures or standards);
- is based on objective and transparent criteria, grounded in the best available scientific or technical evidence;
- takes into account relevant international standards or processes, where they exist; and
- provides for procedural safeguards, including transparency, review mechanisms, and good-faith engagement with affected trading partners.

In this regard, WTO adjudicatory bodies have also attached importance to the coherence between the stated objective of the measure and its actual operation. In *EC – Seal Products*, for example, the AB found arbitrary or unjustifiable discrimination because certain exceptions and aspects of the regime’s administration could not be reconciled with the public moral’s objective invoked. Likewise, in *EU – Palm Oil*, the panels considered that shortcomings in the design, implementation and updating of the regulatory regime contributed to a finding of arbitrary or unjustifiable discrimination.

⁷⁶ Emphasis added.

⁷⁷ AB Report, *United States — Standards for Reformulated and Conventional Gasoline*, 29 April 1996.

54. Disguised restriction on international trade. The chapeau also prohibits measures that operate as a disguised restriction on international trade. According to the AB, the notion of “disguised restriction” concerns situations in which apparent compliance with Article XX conceals the pursuit of trade-restrictive objectives. In other words, a measure may amount to an abuse of Article XX where its formal justification masks protectionist intent or effect.⁷⁸

55. Implications. Applied to the Prohibition in question, these principles have several implications. The EU must demonstrate that the measure is consistently designed and applied to address a genuine environmental risk, and is not applied selectively in a manner that favours certain producers or supply chains.

First, the Prohibition would apply to all minerals extracted through DSM irrespective of origin or regulatory status. In the current state of DSM governance, where no Mining Code has been adopted and no exploitation licences have been issued by the ISA, no differentiation between ISA-licensed and unlicensed minerals arises in practice, and a comprehensive prohibition avoids the discrimination risks that selective treatment would generate under Articles I and III GATT. By contrast, differentiated treatment – for example based on geographic origin or selective cooperation arrangements – would require particularly careful justification to ensure consistency with the environmental objective pursued.

Secondly, should a Mining Code be adopted in the future and exploitation licences issued by the ISA, the scope of the Prohibition would require reassessment. The decisive question at that stage would be whether the Mining Code ensures a level of environmental protection consistent with the precautionary principle, the obligation to protect and preserve the marine environment under Article 145 UNCLOS, and the EU's constitutional requirement of a high level of environmental protection. Where those conditions are met, there may no longer be a basis for extending the Prohibition to ISA-licensed minerals. Where they are not met – as the current state of negotiations strongly suggests would be the case in the near term⁷⁹ – the environmental rationale for a comprehensive prohibition would remain intact, and excluding ISA-licensed minerals from the scope of the Prohibition would reintroduce discrimination risks without a convincing justification linked to the environmental objective.

Such a distinction would in any event be difficult to sustain on substantive grounds. The environmental baseline required to adequately assess the impacts of DSM has not yet been established, and it has been estimated that an additional period of at least 10 to 15 years of scientific research would be necessary to generate the data required to support a regulatory regime capable of ensuring the “*effective protection of the marine environment*” as provided by Article 145 UNCLOS.⁸⁰ There is moreover wide recognition amongst scholars that the draft Mining Code is far from providing sufficient assurance that potential exploitation activities could be carried out in a manner consistent with UNCLOS.⁸¹ Reliance on ISA authorisation as a basis for differential treatment would therefore require the EU to accept that compliance with an evolving international regime, which does not apply the same

⁷⁸ AB Report, *European Communities – Measures affecting asbestos and asbestos-containing products*, 12 March 2001, para. 8.236.

⁷⁹ See points 3 and 31.

⁸⁰ IPOS, “The Global Deep Sea Consultation”. 2025. <https://ipos.earth/global-deep-sea-consultation-pilot-project>. T. Fisher, Z. Douglas KC, T. B. Heather-Latu and J. Jones, “In the Matter of a Proposed Moratorium or Precautionary Pause on Deep-Sea Mining Beyond National Jurisdiction”, *Legal Opinion*, 10 February 2023. Matrix Chambers. <https://www.matrixlaw.co.uk/news/deep-sea-mining-toby-fisher-jessica-jones-co-author-opinion-on-a-moratorium/>

⁸¹ See, for instance, P. Pickens, H. Lily, E. Harrould-Kolieb, C. Blanchard and A. Chakraborty, “From what-if to what-now: Status of the deep-sea mining regulations and underlying drivers for outstanding issues”, *Marine Policy*, Volume 169, 2024. N. Hilmi et al., “Governing the deep: Economic, ecological, and legal perspectives on deep-sea mining in areas beyond national jurisdiction”, *Marine Policy*, Volume 183, 2026.

precautionary threshold or constitutional requirement of a high level of environmental protection, is sufficient to discharge its own legal obligations.⁸²

From a WTO perspective, while the AB has consistently interpreted WTO agreements in light of international law pursuant to Article 31(3) of the Vienna Convention on the Law of Treaties⁸³, the systemic integration principle does not straightforwardly support differential treatment based on ISA authorisation. It cuts both ways: it may reinforce the legitimacy of the Prohibition by reference to the EU's obligations under UNCLOS and the norms of environmental protection enshrined in the BBNJ Agreement, but it does not compel the EU to treat ISA-authorized minerals more favourably, particularly where the ISA framework does not ensure the level of environmental protection the EU deems appropriate. Furthermore, GATT disciplines apply to products as placed on the market, irrespective of the regulatory status of their production process under international law. This means that the international unlawfulness of unilaterally authorised DSM - such as minerals extracted pursuant to a US licence issued outside the ISA framework - cannot, on its own, constitute a sufficient ground of justification under WTO law. It does not follow, however, that such unlawfulness is irrelevant. Indeed, the customary law status of the common heritage principle and the EU's UNCLOS obligations constitute relevant contextual factors that may reinforce the coherence and legitimacy of the measure, particularly under the chapeau of Article XX. The stronger and more legally secure justification nonetheless remains the environmental one – grounded in Articles XX(b) and (g) GATT – which does not depend on establishing the international unlawfulness of the underlying activity and is more likely to withstand scrutiny before a WTO panel.

In both the current and the future scenarios, a comprehensive prohibition covering all deep-sea minerals – whether extracted pursuant to unilateral authorisations or, pursuant to an ISA licence that does not meet the required environmental standards – reinforces the even-handed and non-discriminatory character of the measure.

Such an approach does not amount to a challenge to the ISA regime. Neither UNCLOS nor the ISA framework guarantees market access for minerals extracted in the Area, nor do they preclude States or regional organisations from adopting trade-related measures based on their own environmental objectives. WTO law does not require Members to defer to international regulatory regimes where compliance with those regimes does not ensure the level of protection they deem appropriate.⁸⁴

Thirdly, the role of the precautionary principle is relevant to the design of the Prohibition. While the AB has considered “[un]necessary and probably imprudent” to determine whether the precautionary principle constitutes a rule of customary international law⁸⁵, it has nevertheless endorsed a precautionary approach, recognising that WTO panels “may ... and should, bear in mind that

⁸² For further information, see C. Henet, C. and A. Meeüs, “Do EU Law and the Precautionary Principle Have Anything to Say on Deep-Sea Mining in the Area? A Potential Additional Normative Layer for the EU and its Member States”, *EU Law Live*, 2026. <https://eulawlive.com/op-ed-do-eu-law-and-the-precautionary-principle-have-anything-to-say-on-deep-sea-mining-in-the-area-a-potential-additional-normative-layer-for-the-eu-and-its-member-states/>

⁸³ In its very first report, *US – Gasoline* (1996), the newly established AB noted that DSU Article 3.2 “reflects a measure of recognition that the General Agreement [GATT] is not to be read in clinical isolation from public international law” (AB Report, *United States – Standards for Reformulated and Conventional Gasoline*, 29 April 1996, p. 17). Moreover, DSU Article 3.2 make it compulsory to interpret WTO Agreements in light of extra-systemic law with its reference to the ‘customary rules of interpretation of public international law’.

⁸⁴ The right of Members to set their own appropriate level of protection, including at a level higher than that provided by existing international standards, is a well-established principle of WTO jurisprudence. AB Reports, *US – Gasoline*, 29 April 1996, *Brazil – Retreaded Tyres*, 3 December 2007, and *EC – Seal Products*, 22 May 2014.

See also, by analogy, Article 3.3 of the SPS Agreement.

⁸⁵ See AB Report, *EC – Measures Concerning Meat and Meat Products*, para. 123.

*responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible e.g. life-terminating damage to human health are concerned*⁸⁶.

In a context such as DSM, characterised by significant scientific uncertainty and risks of serious or irreversible environmental harm, reliance on precaution strengthens the coherence and legitimacy of a comprehensive prohibition, both in the current situation and with respect to any near-term ISA-authorized activities that do not meet the required environmental standards. It supports the view that, with the current significant risks and in the absence of sufficient scientific certainty, scientifically proven mitigation or restoration measures and robust regulatory guarantees, a preventive approach may be justified under Article XX, provided that it is applied in a transparent and consistent manner.

Fourthly, the design of the Prohibition should avoid imposing a rigid, EU-specific regulatory model on third countries. Consistent with the AB's practice of interpreting WTO law in light of international environmental instruments, the Prohibition should remain open to equivalent approaches grounded in internationally recognised standards. In particular, should a Mining Code be adopted that demonstrably ensures the level of environmental protection required under UNCLOS and consistent with the EU's precautionary approach, this could provide a basis for reconsidering the scope of the Prohibition with respect to ISA-licensed minerals.

Fifthly, in line with the requirement that the Prohibition be grounded in credible scientific evidence, it should also incorporate mechanisms allowing for periodic review in light of evolving knowledge and regulatory developments, including the possible adoption of a Mining Code. In a context characterised by significant scientific uncertainty, where scientific discoveries in the future may close current knowledge gaps, this approach ensures that the measure remains proportionate.

Finally, while an outright import ban is not excluded under WTO law, it is likely to be subject to heightened scrutiny as it constitutes a particularly trade-restrictive instrument. The EU would therefore need to demonstrate that reasonably available and less trade-restrictive alternatives (such as labelling schemes, due diligence obligations, traceability systems or cooperative international arrangements) would not achieve its chosen level of environmental protection with comparable effectiveness.

In this respect, in the absence of established environmental baseline data, defined harm thresholds and sufficiently developed systems for monitoring, enforcement, mitigation and restoration, such alternatives cannot ensure an equivalent level of protection. In such circumstances, a comprehensive prohibition may be regarded as necessary to attain the level of environmental protection pursued.

- 56. Conclusion.** In sum, WTO case law suggests that the principal risk for a Prohibition lies not in its environmental objective or its extraterritorial dimension, but in its design and application. In the current state of DSM governance, a comprehensive prohibition applying equally to all deep-sea minerals, irrespective of origin or regulatory status, represents the most legally defensible approach as it avoids discrimination risks and it reflects the absence of any internationally agreed environmental standards against which differential treatment could be assessed. If properly designed, justified and applied – incorporating appropriate review mechanisms including in light of any future adoption of a Mining Code – such a measure should be capable of justification under Article XX GATT.

IV. Enforcement

- 57. Traceability.** To be effective and coherent, the Prohibition should also apply to products containing deep sea minerals, which raises practical challenges relating to traceability, evidentiary burdens and

⁸⁶ *Ibid.*, para. 124.

supply chain complexity. As deep-sea minerals become physically indistinguishable from minerals extracted through terrestrial mining after processing and refining, enforcement cannot rely on the intrinsic characteristics of the final product. It must instead be based on traceability, documentation and supply-chain verification mechanisms.

The effectiveness and legality of the measure would therefore depend on the establishment of an appropriate due diligence and traceability framework, defining at least (i) the scope of products covered, including any relevant thresholds for mineral content, the obligations imposed on economic operators, such as due diligence declarations, supplier verification and record-keeping, (ii) the allocation of the burden of proof as regards demonstrating the absence of DSM-derived inputs, (iii) the role of competent authorities, including powers of investigation, control and sanction, and (iv) the interaction with existing EU product legislation and import surveillance mechanisms.

Given this, a regime placing the burden of proof on economic operators to demonstrate the absence of deep-sea minerals, rather than on competent authorities to prove their presence, would be both practically necessary and consistent with established EU precedents such as the EUDR and the Forced Labour Regulation.

The question of whether to apply a *de minimis* threshold for DSM-derived mineral content in downstream products raises a tension between comprehensiveness, which strengthens the WTO defence by ensuring even-handedness, and proportionality, which may require limiting the scope of the measure to products where inputs derived from deep-sea minerals constitute a material component. This threshold question will require careful calibration in the design of the instrument.

Given that DSM activities would take place entirely outside EU territory, effective enforcement would also require mechanisms for international cooperation, including recognition of third-party auditing schemes and engagement with flag States and port States, as well as with the ISA where relevant.

58. Operationalisation. Recent EU supply chain legislation may offer relevant models for operationalising the Prohibition. The EUDR establishes a system of due diligence statements, traceability and risk assessment requiring operators to demonstrate that products placed on the EU market are not linked to deforestation. The Conflict Minerals Regulation imposes supply chain due diligence obligations on importers of certain minerals, focusing on transparency and responsible sourcing. The Batteries Regulation combines due diligence requirements with product-specific obligations and conformity assessment procedures. The Forced Labour Regulation provides for a prohibition of products linked to forced labour, enforced through investigations and evidence-gathering by competent authorities, notwithstanding the physical indistinguishability of the final product. The Corporate Sustainability Due Diligence Directive ('**CSDDD**') may also provide a complementary enforcement mechanism, insofar as it requires large companies to identify and address adverse environmental impacts in their value chains. To the extent that DSM activities constitute such impacts, CSDDD obligations could be leveraged to support compliance with the Prohibition, reducing the need for standalone enforcement infrastructure.

These instruments illustrate a broader evolution in EU trade law whereby market access conditions increasingly target upstream production processes through documentation and due diligence obligations rather than through the physical characteristics of products. Applied to the DSM context, this suggests that a Prohibition covering both minerals and downstream products could be effectively operationalised through a traceability and due diligence-based regime, enabling the EU to condition market access on the absence of DSM-derived inputs despite their physical indistinguishability. While implementation will present practical challenges, this would not be unprecedented in EU law and does not in itself justify refraining from adopting the measure.

Concluding remarks

- 59. The adoption of a Prohibition appears compatible with EU law.** EU primary law – in particular Article 191(2) TFEU (precautionary principle), Articles 3(3) TEU and 11 TFEU, and the Union’s external action objectives (Articles 3(5) and 21 TEU) – provides a strong legal basis for preventive measures in the face of environmental risks and scientific uncertainty. A Prohibition would be consistent with these obligations and draw support from them, although the precise legal characterisation of it would ultimately depend on the legislative choices made in its design.
- 60. Article 192(1) is an appropriate legal basis.** The measure’s centre of gravity lies in environmental protection. Accordingly, Article 192(1) TFEU constitutes the most appropriate legal basis, without excluding the possible use of Articles 207 or 114 TFEU as complementary bases where the trade or internal market dimension of the measure is considered equally significant. The adoption of such a measure is therefore compatible with the allocation of competences under the Treaties.
- 61. WTO law does not prohibit such a Prohibition in principle.** WTO law does not categorically prohibit measures conditioning market access on environmental production methods, including those occurring outside the regulating State’s territory. A Prohibition would likely engage Articles I, III and XI GATT, but may be justified under Article XX(b) and/or (g). WTO law does not impose a strict territorial limitation on Article XX, and measures addressing inherently global environmental concerns – such as the protection of deep-sea ecosystems and marine biodiversity – may, in principle, be justified provided (i) a sufficient nexus exists between the EU and the protected interest, and (ii) the measure complies with the requirements of the chapeau.
- 62. The decisive issue is the design and application of the measure.** The principal legal risk does not lie in the environmental objective or in the extraterritorial dimension of the Prohibition, but in its design and application. To satisfy the chapeau of Article XX, the measure must be applied in a manner that is non-arbitrary and non-discriminatory, coherent and transparent, grounded in scientific evidence and precautionary reasoning, and subject to periodic review in light of evolving knowledge. If these conditions are met, the Prohibition should, in principle, be capable of justification under WTO law.
- 63. A staged and precaution-based approach.** In the current state of DSM governance, where no Mining Code has been adopted and no exploitation licences have been issued by the ISA, the Prohibition would apply to all deep-sea minerals irrespective of origin or regulatory status. At this stage, no differentiation between ISA-licensed and unlicensed minerals arises in practice, and a comprehensive prohibition avoids the discrimination risks that selective treatment would generate under Articles I and III GATT.

Should a Mining Code be adopted in the future, the scope of the Prohibition would require reassessment, the decisive question being whether the Mining Code ensures a level of environmental protection sufficient to meet the EU’s own legal requirements. Where it does, there may no longer be a basis for extending the Prohibition to ISA-licensed minerals. Where it does not, as the current state of negotiations suggests, the comprehensive prohibition would remain warranted.

This staged and precaution-based approach has several advantages. It accurately reflects the current legal and factual situation. It provides a principled and legally grounded criterion for future review – the environmental adequacy of the Mining Code – rather than leaving the reassessment open-ended. And it is consistent with the EU’s current precautionary pause position, which is itself contingent on the same conditions: sufficient scientific knowledge, demonstrated absence of harmful effects, and robust environmental protection provisions under UNCLOS.