

During the intersessional period, participants in the ISA Council's intersessional working group on underwater cultural heritage ("UCH") corresponded via email and met three times in a virtual format to discuss a number of proposals for reflecting language on UCH in the draft exploitation regulations of the ISA. The proposals considered by the intersessional working group were:

- Draft Exploitation Regulations on the protection and preservation of the marine environment, specifically:
  - Draft Exploitation Regulation 44(1)(a)(v)
  - Draft Exploitation Regulation 46bis(2)(b)
  - Draft Exploitation Regulation 46bis(4)(b)
  - Draft Exploitation Regulation 47(3)(b)
  - Draft Exploitation Regulation 48(3)(g)(i)
  - Draft Exploitation Regulation 48bis(2)
  - Draft Exploitation Regulation 49
  - Draft Annex IV, Section 4.2
  - Draft Annex IV, Section 4.3
  - Draft Annex IV, Section 6.2.5
  - Draft Annex IV, Section 6.3
  - Draft Annex IV, Section 9.3
  - Draft Annex IVbis(c)
  - Draft Annex VII(2)(c)bis
- Draft Exploitation Regulations on implementation, compliance, and enforcement, specifically:
  - Draft Exploitation Regulation 99(1)
  - Draft Exploitation Regulation 102(2)(a)
  - Draft Exploitation Regulation 102(2)bis
  - Draft Exploitation Regulation 102(2)ter
- Draft Exploitation Regulations in text facilitated by the ISA Council President, specifically:
  - Draft Exploitation Regulation 28(3)
  - Draft Exploitation Regulation 35
  - Draft Exploitation Regulation
  - Schedule on scope and use of terms

For the full compilation of the proposals above, please see the Google Sheets file at the following link:

[https://docs.google.com/spreadsheets/d/1EYHLN0YUgYxCbxVLjwC\\_xiCqfi2pWgEaMCh7jBLY1D/edit?usp=sharing](https://docs.google.com/spreadsheets/d/1EYHLN0YUgYxCbxVLjwC_xiCqfi2pWgEaMCh7jBLY1D/edit?usp=sharing).

Here are my meeting notes from the first meeting of the intersessional working group:

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1. The meeting started with confirmation of the accuracy of the compilation of references to underwater cultural heritage ("UCH"), archaeological matters, and paleontological matters in the spreadsheet I prepared for the group.

2. The meeting then heard a brief summary from The Ocean Foundation of their rationale for their proposals to include references to UCH in the draft exploitation regulations, including the protection of human history and heritage (in both a tangible and intangible manner); the role of cultural ties and human history in helping us understand the Ocean, including the deep sea; the cultural and ancestral connections of many Indigenous Peoples (including from the Pacific) to the deep sea; the need to address the protection of the remains of nearly two million people in the Ocean from the Atlantic slave trade; the relationship between the work of the International Seabed Authority and matters regulated under the 2001 UNESCO Convention on Protection of the Underwater Cultural Heritage and the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage; and, the need to develop a cohesive and inclusive understanding of such cultural heritage in accordance with the work under those UNESCO Conventions. The representative of The Ocean Foundation also indicated that they are open to how to best refer to UCH in the exploitation regulations, including whether to incorporate UCH as part of the definition of Marine Environment in the exploitation regulations or refer to UCH alongside any mention of the Marine Environment in the exploitation regulations.

3. The meeting then discussed three questions that I shared with the group to guide the group. The three questions were the following:

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1) Should the draft exploitation regulations reference underwater cultural heritage at all?

2) If the draft exploitation regulations are to reference underwater cultural heritage, then what should be the scope of such references? Specifically, should the references be limited to "tangible" underwater cultural heritage, or should they (also) include references to "intangible" cultural heritage? Definition(s) for one/both type(s) of underwater cultural heritage will be welcome for discussion, including any definition(s) in addition to the ones already reflected in the compilation I put together for our use. Suggestions for placement(s) of such references in the draft exploitation regulations will also be welcome, including in addition and/or as alternatives to the placements reflected in the compilation.

3) Are there overlaps between the current references to underwater cultural heritage, archaeological matters, and paleontological matters in the draft exploitation regulations? If there are overlaps between these three categories of references, then should archaeological matters and paleontological matters also be retained in the draft exploitation regulations? Assuming that two or all three categories of references are to remain in the draft exploitation regulations in some form, should all those references be combined in some manner, or should they be kept separate from each other?

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The responses to and comments on those questions did not fit neatly/exclusively under any particular question but instead tended to touch on multiple questions, so I will just recap below the major responses/comments.

4. No participant in the meeting objected to the notion of the exploitation regulations referencing the concepts covered under UCH in some manner. However, participants had varied views on what such references should be and where those references should be placed.

5. Questions were raised about whether there are any precedents in other international instruments and processes for defining the concept of "marine environment" to include UCH. No response was readily offered in response to these questions, although some participants expressed concern about folding UCH into the definition of "Marine Environment" in the exploitation regulations.

6. A point was made that the 2001 and 2003 UNESCO Conventions (referenced above) are limited in the sense that they are not universal instruments, are binding only on the Parties to those Conventions, and should not automatically apply to the work of the International Seabed Authority. In response, a comment was made that the 2001 UNESCO Convention applies to all parts of the Ocean and that article 303 of the United Nations Convention on the Law of the Sea ("UNCLOS") contemplates the role of "other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature" at sea, and so it makes sense for the International Seabed Authority to at least cooperate with the work under the relevant UNESCO Convention(s), including through the exploitation regulations.

7. Comments were made on the need to be consistent with the text of UNCLOS, particularly its article 149 on archeological and historical objects in the Area. Participants also noted that while article 149 only references archaeological and historical **objects**, the exploration regulations (e.g., exploration regulation 35 for polymetallic nodules) cover human remains as well as sites in addition to discrete objects, and the current draft exploitation regulation 35 has this more expansive approach as well, indicating some degree of comfort with building on the text of UNCLOS. A point was also made that the exploitation regulations should focus on the preservation/protection of such human remains, objects, and sites rather than impose additional obligations on relevant actors/entities, particularly Contractors. There was, however, another point raised about how such preservation/protection could be undertaken as part of a "regime" in the exploitation regulations, such as the one identified in draft exploitation 35.

8. Several participants expressed concerns about referencing UCH in Part IV of the exploitation regulations (i.e., the Part on "Protection and preservation of the Marine Environment") and preferred to limit references to UCH to just draft exploitation regulation 35 (in line with article 149 of UNCLOS). Such participants particularly questioned the appropriateness of expanding the scope of obligations for Contractors with respect to UCH and related matters beyond what is contemplated under UNCLOS, as well as queried whether the International Seabed Authority has the appropriate expertise to monitor/regulate the handling of UCH beyond the sort of handling for archaeological and historical objects and sites and human remains contemplated in draft exploitation regulation 35. In response, points were made about how the International Seabed

Authority should at least cooperate with ongoing efforts by other international organizations/entities as well as by individual States with respect to UCH in the Ocean, including work undertaken in accordance with the above-mentioned UNESCO Conventions (which were adopted after UNCLOS was adopted and contribute to a broadening of the international community's understanding of UCH matters not explicitly contemplated in UNCLOS).

9. A point was made about how there appears to be some degree of overlap between UCH, archaeological matters, and paleontological matters, such as the references in draft regulation 35.

10. In addition to discussing the more tangible types of UCH (e.g., objects, sites, human remains), participants discussed whether the draft exploitation regulations should reference **intangible** UCH, and if so, how. A comment was made that the above-mentioned 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage might not necessarily apply to the Area / deep sea but is more relevant (if not restricted) to intangible cultural heritage linked to the territories of those who hold/express/enjoy such heritage. In response, it was pointed out that the 2003 UNESCO Convention need not be restricted to the specific/designated territories of those who hold/express/enjoy such intangible cultural heritage, but can apply more generally to the practices, knowledge, skills, etc., arising in connecting to the Ocean as a whole, including through the traditional knowledge of Indigenous Peoples and local communities pertaining to the Area and the marine environment and biodiversity associated with the Area. A suggestion was made that perhaps intangible UCH could be addressed separately from tangible UCH, with the latter being addressed at the very least through draft exploitation regulation 35 (subject to further modification) and the former being captured as part of the concept of traditional knowledge of Indigenous Peoples and local communities (which is currently reflected as part of "Best Environmental Practices" in the Schedule for the draft exploitation regulations).

11. Participants agreed that I would suggest one or more possible approaches to the issue of UCH in light of the first virtual meeting for consideration by the broader intersessional working group, including in one or more additional virtual meetings of the intersessional working group.

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After the first virtual meeting of the intersessional working group, I suggested (and the working group agreed) that the working group hold a second virtual meeting to continue the discussion from the first virtual meeting, with a focus on the following questions/prompts:

- Whether references to **tangible** UCH should be limited to the framework/approach established by draft exploitation regulation 35, and if so, whether draft exploitation regulation 35 can be expanded to cover some of the elements raised in the current textual proposals for (tangible) UCH in other Parts of the draft exploitation regulations (particularly in Part IV), including, among other things, the conducting of surveys for (tangible) UCH and the consideration of (tangible) UCH in the conducting and evaluation of environmental impact assessments, mindful of concerns raised about the expansion of the obligations of Contractors beyond what UNCLOS contemplates/allows;

- Whether *intangible* UCH (as opposed to tangible UCH) can be captured in some form through references to the traditional knowledge of Indigenous Peoples and local communities in the draft exploitation regulations rather than addressed as a separate matter in the draft exploitation regulations

Prior to the convening of the second virtual meeting, The Ocean Foundation provided written feedback to the intersessional working group on a number of issues previously raised by participants in the working group. The feedback is attached as Appendix I to this narrative report.

Here are my notes for the second virtual meeting of the intersessional working group:

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1. At the beginning of the meeting, representatives from The Ocean Foundation briefly presented the major elements of their written feedback on a number of questions and issues raised in the first virtual meeting. The presentation touched on, among other things, the intersection of underwater cultural heritage ("UCH") and human rights considerations; the duty to cooperate with respect to what The Ocean Foundation considers to be UCH, in accordance with articles 149 and 303 of UNCLOS; the utility of drawing on the definition(s) of UCH from relevant UNESCO Conventions, particularly the 2001 Convention on the Protection of the Underwater Cultural Heritage; the importance of integrating UCH in environmental baseline surveys and environmental impact assessments; and the strong cultural connections of Indigenous Peoples to the deep sea and its marine life, particularly Indigenous Peoples from the Pacific. The Ocean Foundation highlighted its two proposed alternative definitions for the phrase "Objects of an archaeological and historical nature found in the Area," which would essentially fold the UNESCO definition(s) of UCH into that phrase whenever that phrase appears in the exploitation regulations, without necessarily mentioning UCH in the body of those exploitation regulations. An Indigenous member of the delegation of The Ocean Foundation stressed that much of the ISA's consideration of UCH to date has not dealt to any significant extent with the "intangible" type of UCH, despite the deep, longstanding, and sacred connections of Indigenous Peoples to the deep sea and its marine life, even if not strictly of a "tangible" nature.

2. On the issue of human rights linkages to UCH, particularly with respect to "intangible" UCH and the consent/participation of Peoples and communities holding/enjoying such UCH in the work of the ISA, a participant pointed out relevant language in various international instruments, including the UDHR, the ICCPR, the ICESCR, the UNDRIP, and the Aarhus Convention.

3. After the presentation by The Ocean Foundation and a brief Q-and-A session on the presentation, the meeting turned to discussing the two guiding questions I had suggested for the meeting, which deal with the handling of "tangible" UCH on the one hand, particularly under a framework focused on draft exploitation regulation 35; and of "intangible" UCH on the other hand, particularly with respect to whether such "intangible" UCH can be covered by existing references in the draft exploitation regulations (inclusive of Annexes and the Schedule on the use of terms) to the traditional knowledge of Indigenous Peoples and local communities.

4. Participants seemed generally open to references to "tangible" UCH in the draft exploitation regulations, insofar as such "tangible" UCH are primarily (if not exclusively) in terms of human remains, objects, and sites of an archaeological or historical nature found in the Area, using the phrasing from the exploration regulations (e.g., exploration regulation 35 for polymetallic nodules) as well as from draft exploitation regulation 35. A number of participants pointed out that articles 149 and 303 of UNCLOS address the preservation, disposition, protection, and removal of objects of an archaeological and historical nature found at sea in general, and in the Area specifically, and so if such objects are to be considered UCH, then they should be considered to be "tangible" rather than "intangible." Participants also discussed what sort of steps/measures need to be taken when encountering such human remains, objects, and sites, including by Contractors and various organs of the ISA in cooperation with UNESCO and other relevant intergovernmental organizations, while also noting that UNCLOS does not explicitly impose an obligation on Contractors to actively search for such human remains, objects, and sites. A point was raised about how the International Council on Monuments and Sites has extensive resources that can be useful guidance on dealing with such human remains, objects, and sites when encountered, including in connection with baseline surveys and impact assessments.

5. A number of participants acknowledged the definition(s) proposed by The Ocean Foundation for "Objects of an archaeological and historical nature found in the Area" but also expressed divergent views on whether there is a need for such definition(s) at all. A point was also raised that while draft exploitation regulation 35 might cover much of what is envisioned with respect to "tangible" UCH, it might not be sufficient to also cover the incorporation of UCH (particularly the "tangible" sort) in baseline surveys and environmental impact assessments. Another delegation expressed doubt about addressing such "tangible" UCH anywhere in the draft exploitation regulations beyond the confines of draft exploitation regulation 35.

6. With respect to "intangible" UCH, several participants stressed that such UCH includes not just "abstract" cultural values and spiritual connections to the deep sea and its marine life, but also long-held traditional/Indigenous knowledge about the deep sea and the marine life therein, including culturally significant marine species such as whales, sharks, turtles, seals, and corals, with such knowledge being potentially relevant to the fashioning of a full understanding of the marine environment associated with the Area and the potential impacts of exploitation activities on that marine environment. In that sense, there might be a blurring of the lines between "tangible" and "intangible" UCH, given that we are referring to "intangible" knowledge about "tangible" marine life and the associated marine environment, and perhaps it might ultimately not be useful to maintain a strict dichotomy between "tangible" and "intangible" UCH. I also pointed out that if participants would like to address "intangible" UCH in terms of traditional/Indigenous knowledge, then one way to do so might be to follow a suggestion made by a participant in the first virtual meeting, i.e., fold "intangible" UCH into the notion of traditional knowledge of Indigenous Peoples and local communities, which is currently captured as part of the definition of "Best Environmental Practices" in the Schedule, as well as rely on references to sociocultural uses and impacts in Annex IV (Environmental Impact Statement) in the draft exploitation regulations.

7. Participants agreed that I would put together suggested text for consideration of the working group as the possible basis for a submission by the working group. The working group would

consider the text from me before the working group convened for a third (and potentially final) virtual meeting of the working group.

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In accordance with point number 7 of my meeting notes above, I put together and circulated to the intersessional working group a suggested approach to addressing UCH in the draft exploitation regulations, as follows:

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1. Revise draft exploitation regulation 35 to say the following (deleting the reference to paleontological matters, given that there did not seem to be active support for the concept in this working group, and inserting a new legal term of art into the draft regulation):

-- The Contractor shall [immediately] notify the Secretary-General in writing within 24 hours of any finding in the Contract Area of any human remains, **or any Object or Site of an Archaeological or Historical Nature**, historical [~~and paleontological~~] nature, ~~or any object or site of a similar nature~~, and its location, including the preservation and protection measures taken. The Secretary-General shall transmit such information, [within 7 Days of receiving it] to the Sponsoring State, to the State from which the remains, **or Object or Site of an Archaeological or Historical Nature** [~~object or site~~] originated, if known, to the Director General of the United Nations Educational, Scientific and Cultural Organization and to any other competent international organization. Following the finding of any such human remains, ~~object or site~~ **or Object or Site of an Archaeological or Historical Nature** in the Contract Area, and in order to avoid disturbing such human remains, **or Object or Site of an Archaeological or Historical Nature** ~~object or site~~, no further Exploration or Exploitation shall take place, within a reasonable radius, [to be determined by the Authority [in consultation with the Contractor] until such time as the Council decides otherwise, after taking into account the views of the State from which the remains originated, the Director General of the United Nations Educational, Scientific and Cultural Organization or any other competent international organization. [If the Council decides that exploration or exploitation cannot continue, the Contractor shall be compensated, including but not limited to the vicarious areas of equivalent size or value elsewhere or appropriate waiver of fees.]

2. Include in the Schedule on the Use of Terms the phrase "Object or Site of an Archaeological or Historical Nature" and define it as follows (drawing from the relevant UNESCO definition(s), while keeping "human remains" separate from the term and its definition):

-- "All traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously, for at least 100 years such as: (i) sites, structures, buildings, and artifacts, together with their archaeological and natural context; (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and (iii) objects of prehistoric character"

3. With respect to proposed references to UCH (and UCH-related matters) in draft exploitation regulations and associated Annexes pertaining to the protection and preservation of the marine environment, delete proposed references to UCH (and UCH-related matters) in:

- draft exploitation regulation 44(1)(a)(v) (which proposes expanding the definition of "Marine Environment" to include UCH, a proposal that in my view goes beyond the understood scope of what the Marine Environment is, i.e., environmental/marine rather than anthropogenic/anthropocentric)
- draft exploitation regulation 46bis(2)(b) (which folds UCH into the definition of "Marine Environment")
- draft exploitation regulation 46bis(4)(b) (which references an affirmative obligation of a Contractor to conduct a survey of the seabed for UCH, which at least one delegation has explicitly opposed)
- draft exploitation regulation 47(3)(b) (which also references an affirmative obligation of a Contractor to conduct a survey of the seabed for UCH)
- draft exploitation regulation 48(3)(g)(i) (which references "archaeological impacts" without explicitly connecting the reference to UCH)
- Section 4.2 of Annex IV (which focuses on geophysical/oceanographic conditions of a site and does not lend itself well to anthropogenic/anthropocentric UCH references)
- Section 4.3 of Annex IV (which requires the conducting of seabed surveys for UCH, and which is placed in a Section that focuses on geophysical/oceanographic conditions of a site)
- Annex IVbis(c) (which folds UCH under the notion of "environmental setting" as part of a Scoping Report, similar to the above-mentioned proposal to include UCH in the definition of "Marine Environment")
- Annex VII(2)(c)(bis) (which requires the conducting of baseline studies for UCH and folds such studies under the concept of environmental baseline data as part of the suite of information to be captured in an EMMP)

4. Delete proposed definitions for "Best Archaeological Practices," "Intangible Cultural Heritage," and "Underwater Cultural Heritage" in the Schedule; delete the reference to a survey of the seabed to identify objects of an archeological and historical nature in the definition for "Environmental Management System" in the Schedule; and delete the reference to baseline studies for UCH in the definition for "Environmental Effect" in the Schedule

5. Revise draft exploitation regulation 48bis(2) to say the following (ensuring alignment with the legal term of art proposed above, and reflecting existing UNCLOS and exploration regulation language on the duty to protect under article 149):

- The purpose of test mining is to ensure that effective protection of the marine environment from harmful effects is ensured. Test mining projects shall as a general rule provide evidence that appropriate equipment is available to ensure the effective protection of the Marine Environment in accordance with Article 145 and the duty to protect Objects or Sites of an Archeological or Historical Nature ~~Underwater Cultural Heritage (specifically objects of an archaeological and historical nature)~~ under Article 149

6. Revise draft exploitation regulation 49 to say the following (ensuring alignment with the legal term of art proposed above, and reflect obligations under article 149 of UNCLOS):



-- A Contractor shall take all the necessary and appropriate measures to protect and preserve the Marine Environment and coastlines by preventing, reducing and controlling pollution and other hazards, including marine litter and underwater noise, from its activities in the Area. This is to be done in accordance with its Environmental Management and Monitoring Plan and all relevant Rules of the Authority, the relevant applicable Regional Environmental Management Plan, taking account of the applicable Guidelines. If a potentially polluting wreck is discovered and it is an **Object or Site of an Archaeological or Historical Nature** ~~object of an archaeological and historical nature~~, then the duty to protect such **wreck** heritage must also be considered consistent with Article 149.

7. Revise Section 6.2.5 of Annex IV to say the following (ensuring alignment with the legal term of art proposed above, without explicitly mandating the conducting of a seabed survey or a baseline study for UCH):

-- List human activities in the project area (e.g., traditional navigation routes, migratory paths of culturally significant marine species, sacred sites and waters associated with ritual or ceremonial activities of Indigenous Peoples and local communities as well as known or suspected **Objects or Sites of an Archaeological or Historical Nature** ~~Underwater Cultural Heritage~~)

8. Revise Section 6.3 of Annex IV to say the following (ensuring alignment with the legal term of art proposed above, without explicitly mandating the conducting of a seabed survey or a baseline study for UCH):

-- List any **Objects or Sites of an Archaeological or Historical Nature** ~~sites of archaeological or historical significance~~ that are known to occur or may occur within the potential area of impact. Provide a map showing known **Objects or Sites of an Archaeological or Historical Nature** ~~archaeological and historical sites~~ in relation to proposed operations and note any areas of interaction or cumulative impact. Known human connections to or uses of the area should also be acknowledged. Copies of surveys of the project area shall be submitted with notes about anomalies that may indicate the presence of **Objects or Sites of an Archaeological or Historical Nature** ~~objects of an archaeological and historical nature~~ that should be subject to further research before any potentially destructive activities occur.

9. Revise Section 9.3 of Annex IV to say the following (ensuring alignment with the legal term of art proposed above, without explicitly mandating the conducting of a seabed survey or a baseline study for UCH, and deleting the reference to paleontological matters):

-- Describe, as applicable, potential impacts to **Objects or Sites of an Archaeological or Historical Nature** ~~sites of archaeological, paleontological or historical significance~~ that are known to occur within the potential area of impact, along with proposed management measures and a description of residual impacts.

10. With respect to proposed references to UCH (and UCH-related matters) in draft exploitation regulations pertaining to implementation, compliance, and enforcement, delete proposed references to UCH (and UCH-related matters) in:

-- draft exploitation regulation 99(1) (which folds UCH into the concept of Marine Environment)

-- draft exploitation regulation 102(2)(a) (which folds UCH into the concept of environmental data, whereas the draft exploitation regulations do not typically take an anthropogenic/anthropocentric approach to defining environmental data)

-- draft exploitation regulation 102(2)bis (which refers to best archaeological techniques, which is a concept closely related to the term "Best Archaeological Practices" that is proposed above for deletion from the Schedule)

-- draft exploitation regulation 102(2)ter (which requires the conducting of a survey of the seabed for UCH)

11. Revise draft exploitation regulation 28(3) to say the following (ensuring alignment with the legal term of art proposed above):

-- Notwithstanding paragraph 1 above, the Contractor shall [temporarily] [immediately] [reduce or] suspend production whenever such reduction or suspension is required to protect the Marine Environment from [Serious Harm or a threat of Serious Harm] or to protect human health and safety [to protect the Marine Environment from Serious Harm or a threat of Serious Harm, to protect human health and safety or to protect human remains, **or Objects or Sites of an Archaeological or Historical Nature** ~~objects or sites of archaeological or historical nature~~] [upon the receipt of emergency order pursuant to regulation [4(4) or on the Contractor's own decision that maintaining the level of production would result in Serious Harm or a threat of Serious Harm.] A Contractor shall notify the Secretary-General [and the Sponsoring State or States] [States] of such a reduction or suspension of production as soon as is practicable and no later than [72] [24] hours after production is [reduced or] suspended.

12. For "intangible" UCH, rely on references to the traditional knowledge of Indigenous Peoples and local communities, as part of the definition of "Best Environmental Practices," as well as on references to sociocultural uses and sociocultural impacts in Annex IV. There might also be the need to have corresponding references (perhaps under draft exploitation regulation 2 as a principle/approach) to the protection, promotion, and upholding of the rights of the holders of such traditional knowledge in the implementation of the exploitation regulations, including their right of free, prior and informed consent as well as their right to participate in all decision-making potentially affecting their knowledge and interests, similar to language in the Post-2020 Global Biodiversity Framework of the CBD and associated CBD COP decision(s) as well as in the BBNJ instrument.

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The intersessional working group agreed to hold a third (and potentially final) virtual meeting, in order to consider my proposed approach above to UCH references in the draft exploitation regulations. My notes for the third virtual meeting are as follows:

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1. I began the meeting by recapping my suggested proposals for reflecting "tangible" and "intangible" underwater cultural heritage ("UCH") in the draft exploitation regulations, as shared in the 12 bullet points provided to the intersessional working group prior to the third virtual meeting. I then invited meeting participants to provide feedback on my suggested proposals.

2. A number of delegations expressed general support for the approach taken in my suggested proposals, particularly their treatment of "tangible" UCH. A delegation noted, however, that my proposed definition for "Object or Site of an Archaeological or Historical Nature" (which draws from the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage) is limited to objects/sites that have been underwater for at least 100 years upon discovery. This will likely leave out, e.g., WWII-era wrecks/objects/sites that would otherwise qualify. It was also noted that

UNCLOS does not impose that sort of time-bound limitation in its references to objects of an archaeological or historical nature. It was suggested that the definition be amended to either reduce the 100 years to 75 years, or to remove the time element completely.

3. A delegation proposed tweaks to several of my suggested proposals -- specifically, to draft exploitation regulation 48bis(2) (delete the reference to the duty to protect Objects or Sites of an Archaeological or Historical Nature during the conduct of test mining, as that goes beyond what UNCLOS obligates Contractors to do); to draft exploitation regulation 49 (delete the reference to protecting a polluting wreck in accordance with article 149 of UNCLOS if it is also an Object or Site of an Archaeological or Historical Nature); to Section 6.3 of Annex IV (delete "or may occur," insert "as applicable" after "Provide a map," and delete all the text after "cumulative impact"); to Section 9.3 of Annex IV (delete "and a description of residual impacts," as that goes beyond what UNCLOS obligates Contractors to do); and to draft exploitation regulation 28(3) (delete references to human remains and Objects or Sites of an Archaeological or Historical Nature, as those are already covered by draft exploitation regulation 35, and there are limited bases for the issuance of emergency orders under UNCLOS that do not necessarily apply with respect to human remains and Objects or Sites of an Archaeological or Historical Nature). No objections were raised in the meeting to any of these proposed tweaks.

4. A number of delegations expressed some concern with my suggestion of folding the notion of "intangible" UCH into the concept of traditional knowledge of Indigenous Peoples and local communities, which is currently captured as part of the definition of "Best Environmental Practices" in the Schedule. The point was made that "Best Environmental Practices," as currently defined in the Schedule, addresses environmental controls primarily and does not necessarily capture the notion of cultural values about and relationship to the deep seabed / marine environment in their totality, including with respect to the rights of the holders/practitioners of that knowledge/heritage. Indeed, a participant proposed a standalone definition for "intangible" UCH rather than rely on the concept of traditional knowledge in "Best Environmental Practices." Along these lines, there was some discussion about the need to clarify that cultural connections to the marine environment are present even in the absence of specific objects or sites, and care needs to be taken to capture such cultural connections for their own sake without relying on something like the concept of traditional knowledge, which might be more object-, biodiversity-, and site-specific than appropriate in certain situations.

5. Other delegations expressed some degree of openness to my suggestion of folding the notion of "intangible" UCH into the concept of traditional knowledge of Indigenous Peoples and local communities as part of the definition of "Best Environmental Practices." The point was made that my approach retains some degree of flexibility in the application of the notion of "intangible" UCH in appropriate parts of the draft exploitation regulations, including by avoiding a rigid (and potentially difficult-to-agree) definition for "intangible" UCH.

6. At the end of the meeting, the participants agreed that I would revise my suggested proposals to reflect the comments made in the third virtual meeting. My revisions would aim to present a number of bullet points that could comprise a proposal from this intersessional working group with respect to "tangible" UCH. The revisions would be placed under silence procedure for the

intersessional working group until COB 15 May (EDT / NY time), at which point, barring any objections from the intersessional working group, I would submit the proposals to the ISA on behalf of the intersessional working group. As for "intangible" UCH, the participants agreed that more time will be needed to discuss the matter, and so the intersessional working group will report to the ISA on the discussions so far on "intangible" UCH and recommend further consideration of the matter by the ISA Council (including, potentially, future iterations of the intersessional working group).

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Per item number 6 in the meeting notes above, I revised my suggested proposals, as follows:

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1. Revise draft exploitation regulation 35 to say the following (deleting the reference to paleontological matters, given that there did not seem to be active support for the concept in this working group, and inserting a new legal term of art into the draft regulation):

-- The Contractor shall [immediately] notify the Secretary-General in writing within 24 hours of any finding in the Contract Area of any human remains, or any Object or Site of an Archaeological archaeological or Historical Nature, historical [and paleontological] nature, ~~or any object or site of a similar nature~~, and its location, including the preservation and protection measures taken. The Secretary-General shall transmit such information, [within 7 Days of receiving it] to the Sponsoring State, to the State from which the remains, or Object or Site of an Archaeological or Historical Nature [object or site] originated, if known, to the Director General of the United Nations Educational, Scientific and Cultural Organization and to any other competent international organization. Following the finding of any such human remains, ~~object or site~~ or Object or Site of an Archaeological or Historical Nature in the Contract Area, and in order to avoid disturbing such human remains, or Object or Site of an Archaeological or Historical Nature ~~object or site~~, no further Exploration or Exploitation shall take place, within a reasonable radius, [to be determined by the Authority [in consultation with the Contractor] until such time as the Council decides otherwise, after taking into account the views of the State from which the remains originated, the Director General of the United Nations Educational, Scientific and Cultural Organization or any other competent international organization. [If the Council decides that exploration or exploitation cannot continue, the Contractor shall be compensated, including but not limited to the vicarious areas of equivalent size or value elsewhere or appropriate waiver of fees.]

2. Include in the Schedule on the Use of Terms the phrase "Object or Site of an Archaeological or Historical Nature" and define it as follows (drawing from the relevant UNESCO definition(s), while keeping "human remains" separate from the term and its definition):

-- "All traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously, **for at least 100 years** such as: (i) sites, structures, buildings, and artifacts, together with their archaeological and natural context; (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and (iii) objects of prehistoric character"

3. With respect to proposed references to UCH (and UCH-related matters) in draft exploitation regulations and associated Annexes pertaining to the protection and preservation of the marine environment, delete proposed references to UCH (and UCH-related matters) in:

- draft exploitation regulation 44(1)(a)(v) (which proposes expanding the definition of "Marine Environment" to include UCH, a proposal that in my view goes beyond the understood scope of what the Marine Environment is, i.e., environmental/marine rather than anthropogenic/anthropocentric)
- draft exploitation regulation 46bis(2)(b) (which folds UCH into the definition of "Marine Environment")
- draft exploitation regulation 46bis(4)(b) (which references an affirmative obligation of a Contractor to conduct a survey of the seabed for UCH, which at least one delegation has explicitly opposed)
- draft exploitation regulation 47(3)(b) (which also references an affirmative obligation of a Contractor to conduct a survey of the seabed for UCH)
- draft exploitation regulation 48(3)(g)(i) (which references "archaeological impacts" without explicitly connecting the reference to UCH)
- Section 4.2 of Annex IV (which focuses on geophysical/oceanographic conditions of a site and does not lend itself well to anthropogenic/anthropocentric UCH references)
- Section 4.3 of Annex IV (which requires the conducting of seabed surveys for UCH, and which is placed in a Section that focuses on geophysical/oceanographic conditions of a site)
- Annex IVbis(c) (which folds UCH under the notion of "environmental setting" as part of a Scoping Report, similar to the above-mentioned proposal to include UCH in the definition of "Marine Environment")
- Annex VII(2)(c)(bis) (which requires the conducting of baseline studies for UCH and folds such studies under the concept of environmental baseline data as part of the suite of information to be captured in an EMMP)

4. Delete proposed definitions for "Best Archaeological Practices," "Intangible Cultural Heritage," and "Underwater Cultural Heritage" in the Schedule; delete the reference to a survey of the seabed to identify objects of an archeological and historical nature in the definition for "Environmental Management System" in the Schedule; and delete the reference to baseline studies for UCH in the definition for "Environmental Effect" in the Schedule

5. Revise draft exploitation regulation 48bis(2) to say the following (ensuring alignment with the legal term of art proposed above, and reflecting existing UNCLOS and exploration regulation language on the duty to protect under article 149):

- The purpose of test mining is to ensure that effective protection of the marine environment from harmful effects is ensured. Test mining projects shall as a general rule provide evidence that appropriate equipment is available to ensure the effective protection of the Marine Environment in accordance with Article 145 ~~and the duty to protect **Objects or Sites of an Archeological or Historical Nature** Underwater Cultural Heritage (specifically objects of an archaeological and historical nature) under Article 149~~

6. Revise draft exploitation regulation 49 to say the following (ensuring alignment with the legal term of art proposed above, and reflect obligations under article 149 of UNCLOS):

-- A Contractor shall take all the necessary and appropriate measures to protect and preserve the Marine Environment and coastlines by preventing, reducing and controlling pollution and other hazards, including marine litter and underwater noise, from its activities in the Area. This is to be done in accordance with its Environmental Management and Monitoring Plan and all relevant Rules of the Authority, the relevant applicable Regional Environmental Management Plan, taking account of the applicable Guidelines. **If a potentially polluting wreck is discovered and it is an Object or Site of an Archaeological or Historical Nature object of an archaeological and historical nature, then the duty to protect such wreck heritage must also be considered consistent with Article 149.**

7. Revise Section 6.2.5 of Annex IV to say the following (ensuring alignment with the legal term of art proposed above, without explicitly mandating the conducting of a seabed survey or a baseline study for UCH):

-- List human activities in the project area (e.g., traditional navigation routes, migratory paths of culturally significant marine species, sacred sites and waters associated with ritual or ceremonial activities of Indigenous Peoples and local communities as well as known or suspected **Objects or Sites of an Archaeological or Historical Nature** Underwater Cultural Heritage)

8. Revise Section 6.3 of Annex IV to say the following (ensuring alignment with the legal term of art proposed above, without explicitly mandating the conducting of a seabed survey or a baseline study for UCH):

-- List any **Objects or Sites of an Archaeological or Historical Nature** ~~sites of archaeological or historical significance~~ that are known to occur ~~or may occur~~ within the potential area of impact. Provide a map **as applicable** showing known **Objects or Sites of an Archaeological or Historical Nature** ~~archaeological and historical sites~~ in relation to proposed operations and note any areas of interaction or cumulative impact. **Known human connections to or uses of the area should also be acknowledged. Copies of surveys of the project area shall be submitted with notes about anomalies that may indicate the presence of Objects or Sites of an Archaeological or Historical Nature objects of an archaeological and historical nature that should be subject to further research before any potentially destructive activities occur.**

9. Revise Section 9.3 of Annex IV to say the following (ensuring alignment with the legal term of art proposed above, without explicitly mandating the conducting of a seabed survey or a baseline study for UCH, and deleting the reference to paleontological matters):

-- Describe, as applicable, potential impacts to **Objects or Sites of an Archaeological or Historical Nature** ~~sites of archaeological, paleontological or historical significance~~ that are known to occur within the potential area of impact, along with proposed management measures **and a description of residual impacts.**

10. With respect to proposed references to UCH (and UCH-related matters) in draft exploitation regulations pertaining to implementation, compliance, and enforcement, delete proposed references to UCH (and UCH-related matters) in:

-- draft exploitation regulation 99(1) (which folds UCH into the concept of Marine Environment)

-- draft exploitation regulation 102(2)(a) (which folds UCH into the concept of environmental data, whereas the draft exploitation regulations do not typically take an anthropogenic/anthropocentric approach to defining environmental data)

-- draft exploitation regulation 102(2)bis (which refers to best archaeological techniques, which is a concept closely related to the term "Best Archaeological Practices" that is proposed above for deletion from the Schedule)

-- draft exploitation regulation 102(2)ter (which requires the conducting of a survey of the seabed for UCH)

11. Revise draft exploitation regulation 28(3) to say the following (ensuring alignment with the legal term of art proposed above):

-- Notwithstanding paragraph 1 above, the Contractor shall [temporarily] [immediately] [reduce or] suspend production whenever such reduction or suspension is required to protect the Marine Environment from [Serious Harm or a threat of Serious Harm] or to protect human health and safety [to protect the Marine Environment from Serious Harm or a threat of Serious Harm, to protect human health and safety ~~or to protect human remains, or Objects or Sites of an Archaeological or Historical Nature~~ objects or sites of archaeological or historical nature]. [upon the receipt of emergency order pursuant to regulation [4(4) or on the Contractor's own decision that maintaining the level of production would result in Serious Harm or a threat of Serious Harm.] A Contractor shall notify the Secretary-General [and the Sponsoring State or States] [States] of such a reduction or suspension of production as soon as is practicable and no later than [72] [24] hours after production is [reduced or] suspended.

12. ~~For "intangible" UCH, rely on references to the traditional knowledge of Indigenous Peoples and local communities, as part of the definition of "Best Environmental Practices," as well as on references to sociocultural uses and sociocultural impacts in Annex IV. There might also be the need to have corresponding references (perhaps under draft exploitation regulation 2 as a principle/approach) to the protection, promotion, and upholding of the rights of the holders of such traditional knowledge in the implementation of the exploitation regulations, including their right of free, prior and informed consent as well as their right to participate in all decision-making potentially affecting their knowledge and interests, similar to language in the Post-2020 Global Biodiversity Framework of the CBD and associated CBD COP decision(s) as well as in the BBNJ instrument. For "intangible" UCH, more discussion is needed by the Council, including with respect to whether such UCH should be folded into the concept of traditional knowledge of Indigenous Peoples and local communities as part of the definition of "Best Environmental Practices" or should be addressed in a separate/standalone fashion in the exploitation regulations, recognizing the need to balance out flexibility in the implementation of the exploitation regulations on the one hand with the full, respectful, and rights-based reflection of all cultural connections to and valuations of the marine environment (beyond object-, biodiversity-, or site-specific traditional knowledge) on the other hand.~~

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After the silence procedure commenced, I received feedback on my revised proposals from several delegations. Greenpeace International expressed the following:

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1. Firstly we do object to removing the reference to the duty to protect Objects or Sites of an Archaeological or Historical Nature during the conduct of test mining. The UNESCO Convention on the Protection of the Underwater Cultural Heritage also protects such objects and sites: no authorization shall be granted for any activity directed at underwater cultural heritage located in the Area except in conformity with the provisions of Article 12 of that Convention.

2. Secondly, we also object to the following proposed changes:

- to Section 6.3 of Annex IV (delete "or may occur," and delete all the text after "cumulative impact"); and

- to Section 9.3 of Annex IV (delete "and a description of residual impacts,")

for the same reason. These are all reasonable requirements to protect underwater cultural heritage.

- And finally we also object to the proposed changes to draft exploitation regulation 28(3) (delete references to human remains and Objects or Sites of an Archaeological or Historical Nature,). Regulation 28 has a different focus than Regulation 33 as it requires suspension of production, whereas Regulation 33 is about notification. Briefly stated, the Draft Regulations need to implement all international obligations, including those in the two UNESCO Conventions and to those expressed in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP); not only those found in UNCLOS.

3. Finally, thank you for your description of the discussion of intangible cultural heritage. We look forward to discussing this further. As you will appreciate, this is a critical issue.

We therefore do kindly ask you to request further time to consider this matter and also that we have a dedicated call on this issue.

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TBA21 also submitted written feedback, which is reflected as Appendix II attached to this document.

The delegation of Singapore provided preliminary comments in writing on my revised proposals with a view towards continuing discussions on this matter at the upcoming Council session in July 2023 and/or in the next intersessional period, as reflected in Appendix III attached to this document.

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Finally, several delegations/participants indicated that they would not be able to provide substantive feedback on my revised proposals for a long while, potentially up until the next meeting of the ISA Council scheduled for July 2023, and definitely not in time to meet the submission deadline to the ISA Council for the intersessional working group.

In light of the feedback received from delegations/participants, including those indicating that they will not be able to provide substantive comments on the bullet points anytime soon as well as those expressing a desire for the intersessional working group to reach consensus on its outputs, the group:

- 1) ***Determined that the group will not be able to submit textual proposals to the ISA in a timely manner;***
- 2) ***Decided that I would submit a narrative report to the ISA Council detailing the group's discussions to date, including a compilation of specific proposals made by members of the group, my bullet points, and feedback to such proposals/points. The present document is that narrative report;***



- 3) Decided to recommend to the ISA Council that all proposals pertaining to UCH in the draft exploitation regulations that were made prior to the commencement of the intersessional working group (as reflected in the Google Sheets file linked above) remain in the next iteration of the draft exploitation regulations, but in brackets, with a view to further consideration by the Council (including potentially through a future iteration of the intersessional working group);**
- 4) Decided to request the ISA Secretariat to post this narrative report on the ISA website page dedicated to the outputs of the intersessional working groups**

## APPENDIX I

# The Ocean Foundation: Second ISA Underwater Cultural Heritage Intersessional Key Talking Points

## Duty to Protect and to Cooperate for that Purpose under the Law of the Sea

Under the [1982 Law of the Sea Convention \(LOSC\)](#) Article 303 (1)

- “States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.”

This duty that applies to our heritage in all maritime zones, including the Area under the high seas, which is also covered in article 149:

- “All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.”

Therefore, the members of the ISA have an obligation to address this duty in the regulations for deep seabed mining.

## 1. Defining Underwater Cultural Heritage (UCH) using the precedent of UNESCO's 2001 Convention on the Protection of Underwater Cultural Heritage

The LOSC terms of “objects of an archaeological and historical nature” are vague and subject to debate. TOF recommends using the definition of “Underwater Cultural Heritage (UCH)” as found in the UNESCO 2001 Convention and consider using the term and acronym UCH hereinafter.

The use of text from other international agreements **is often helpful in harmonizing international law**. This offers clarity and precedent on how to classify objects of an archaeological and historical nature. A nation does not need to be a signatory too, or accept the substance of, the UNESCO agreements in order to use the definitions therein. Note also that there **was a consensus on the definition of UCH under UNESCO** including by nations that are not signatories.

### Options for the Mining Code's Underwater Cultural Heritage Definitions

The agreed [UNESCO 2001 Convention](#) Definition of UCH from Article 1.1(a):

“Underwater Cultural Heritage” means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously, for at least 100 years such as: (i) sites, structures, buildings, artifacts and human remains, together with their archaeological and natural context; (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and (iii) objects of prehistoric character.

#### Option 1:

“Objects of an archaeological and historical nature found in the Area” means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously, for at least 100 years such as: (i) sites, structures, buildings, artifacts and human remains, together with their archaeological and natural context; (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and (iii) objects of prehistoric character.

## Option 2:

“Objects of an archaeological and historical nature found in the Area” means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously, for at least 100 years such as: (i) sites, structures, buildings, artifacts and human remains, together with their archaeological and natural context; (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and (iii) objects of prehistoric character hereinafter “Underwater Cultural Heritage (UCH).

### 2. Integration of UCH into Baseline Surveys and EIAs prior to any licensing

The baseline surveys of the marine environment must also include surveys of “objects of an archaeological and historical nature” or more simply and precisely UCH. These baseline surveys should provide the basis for the affected marine environment that is the subject of the environmental impact assessments to be required before the licensing and conduct of mining. In order for mining to truly be sustainable, the Ocean Science-based decision making must be based on EIAs and include the baseline survey information that identifies the **ocean heritage (natural and cultural) that members have a duty to protect under UNCLOS Articles 149, 303(1), and Part XII.**

There are precedents. For example, the [EU Directive on Environmental Impacts](#) amendments in 2014 refer to the need to assess the effects of projects on, among other things, “**biodiversity... water...cultural heritage**, including architectural and **archaeological aspects**” (Annex IV (Information for the Environmental Impact Assessment Report)

### 3. Integration of Cultural and Natural in the Protection and Management of Heritage

UCH and natural heritage are linked, both practically in the marine environment and in international conventions. UCH becomes an integral part of the marine environment, such as when UCH often acts as an artificial reef. So while there are distinct legal obligations to protect natural and cultural heritage it makes sense to integrate the legal obligations to protect them in the Environmental Impact Assessments.

| Convention   | Relevant Text or Provisions  |
|--|--|
| <a href="#">1972 World Heritage Convention</a>   | <p>The first international law recognising special places for the significance of 'outstanding universal value' of <b>both</b> natural and cultural heritage.</p> <p>Member states should <b>"take measures to protect their cultural and natural heritage against the possible harmful effects of the technological developments characteristic of modern civilization"</b></p> |
| <a href="#">UNESCO 2001 Convention</a>   | <p>Article 10(2): <b>links UCH and natural resources</b>, providing state parties with a basis to take action to prevent activities directed at UCH from damaging natural resources.</p>   |
| <a href="#">European Convention on the Protection of the Archaeological Heritage. 1992</a> | <p>Notes that elements of archaeological heritage include remains and objects that help retrace "the history of <b>mankind and its relation with the natural environment</b>" on land and underwater.</p>  |
| <a href="#">UN Convention on Biological Diversity 1992</a>                                 | <p>Annex I notes that ecosystems and habitats include ones "of <b>social, economic, cultural or scientific importance</b>"</p>   |
| <a href="#">The Barcelona Convention 1995</a>  | <p>The Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona Convention) with the Mediterranean Action Plan (MAP), a regional seas program with a main objective is <b>"to protect the natural and cultural heritage"</b> and it advocates for sustainable development.</p>   |

**Marine Spatial Planning - Integrating UCH** may be the best way to address the duties to Protect the Marine Environment and "objects of an archaeological and historical nature" This would be consistent with a Precautionary Approach as well as the recent agreement on Biodiversity Beyond National Jurisdiction.

## 4. Intangible Cultural Heritage

Intangible heritage must also be protected from harmful activities as disturbances to the deep sea has the potential to harm the relationships many communities have built with the ocean. **Seafaring peoples have traversed the Pacific for the last few thousand years.**

- Movement from Polynesia to Hawaii was completed as early as 500 AD. Tangible evidence of these voyages is scant, so intangible heritage and history of these journeys are even more important– even sacred.
- Pacific methods of ‘wayfinding’ led to inter- and intra-island connections with the sea and coast being seen as a sacred and spiritual place.

Many Pacific Indigenous peoples hold a known intangible cultural and ancestral connection to the deep sea.

- In the Pacific, the sea is seen by some as both an ancestor itself, and as a resting place for ancestors.
- Many Pacific people also have a unique relationship with whales, and cetaceans will be affected by noise from DSM operations. In one specific example, noise from DSM has the potential to negatively impact local practices, such as shark calling, as well as the migration of whales– which have cultural importance to many people globally.
- Concerns have also been raised about DSM’s interactions with some cultures’ understanding of responsibility to the ocean or special regard for the deep ocean.

Acknowledgement and awareness of these conversations **have not found** a place in regulatory development at the ISA. Thus, the voices of some stakeholders are not being heard, including those of Indigenous Peoples, who have a right to opine on matters that affect their cultural practices and traditional knowledge. This intersessional as an outcome of the March 2023 ISA meetings is a step in the right direction to honor and acknowledge the cultural diversity of the planet.

International Precedents

### [The Rio Declaration on Environment and Development 1992](#)

- Principle 22 states that Indigenous people and their communities and other local communities have a vital role in environmental management and development and States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of

sustainable development.

[UNESCO Intangible Cultural Heritage Convention 2003](#)

- “Considering the deep-seated interdependence between the intangible cultural heritage and the tangible cultural and natural heritage”

## 5. Contractor Expertise and UCH

It is very promising that there is a recognition here that we have an obligation to protect UCH, but the fact that contractors do not have the expertise in the area is no excuse to not include UCH in impact assessments. The Ocean Foundation stands by to discuss this with any parties.

## APPENDIX II

**T ∞ Thyssen**  
**B Bornemisza**  
**→ A Art Contemporary**

May 15th, 2023

**Intersessional Working group on Underwater Cultural Heritage, led by Federated States of Micronesia**

**A Thyssen Bornemisza Art Contemporary Submission**

**In collaboration with Southampton Marine & Maritime Institute Special Interest Group on “Ocean Justice”.**

The submission emerges from the series of discussion from the International Seabed Authority Council meetings from 16-31 March, 2023 and thereafter follows up meetings from webinars facilitated by the Federated States of Micronesia towards the Intersessional Working group on Underwater Cultural Heritage. We, as a working group, would like to immensely thank the facilitator Clement Yow Mulalap for his leadership and support to spearhead this International working group on Underwater Cultural Heritage. We particularly appreciate the Ocean Foundation, our fellow observers and colleagues for their initiative on Underwater Cultural Heritage as well as the presence of Pacific indigenous leaders that raised awareness, concerns and imparted their deep knowledge towards this initiative.

Following the discussions, we wish to submit our comments through concerns and questions to further think with the Mining Code, and together with the efforts made from our State representatives and other observers. Our position on deep sea mining is very clear in that we acknowledge that the Mining Code is far from prepared and requires a robust set of regulations for the future of deep sea mining. The 2 year rule trigger is a legal complexity that is still not yet resolved and the timeline of the Mining Code’s finalization within July 2023 is simply too narrow and near to impossible. We also emphasize that there is a lack of stakeholder engagement and through this submission, we have attempted to make the channels of accessible information around the Mining Code more inclusive by the involvement of expert and scholarly researchers across various disciplines with the intention of a robust Mining Code in place. Therefore, we make this submission from a collaboration with the Southampton Marine and Maritime Institute, University of



Southampton in which a cluster of researchers, scholarly experts across their fields of research came together as a working group to brainstorm about ideas and concepts of Underwater Cultural Heritage to weigh in on the Mining Code. We also immensely support the discussions brought to us by Pacific indigenous leaders whom we are continuing to learn with and on a deeper scale, and we encourage their participation in this intersessional working group on underwater cultural heritage and at the International Seabed Authority meetings moving forward.

We will proceed with questions posed to us that came up during our webinars dated 18 April, 28 April and 11 May, facilitated by the Federated States of Micronesia and further raise comments accordingly.

## a. Understanding 'heritage'

- (1) Concerns to the definition of 'heritage' in the principle of 'common heritage of all mankind' and 'cultural heritage'
  - The narrow meaning of 'heritage' is to inherit, right at birth, or succession / legacy within the time portal of the past, present and the future.
  - 'Heritage' as a broader definition to a human and non-human assemblage across different temporalities would include objects, sites, chemical and biological properties, art, history, culture, nature, custom and tradition. There appears a far greater complexity with regard to the understanding and approach of 'heritage' when considering such entanglements.
  - Through the lens of an all encompassing understanding of 'heritage', there is a possibility to strike this human and non-human assemblage in which the seabed and its resources are a lively, thriving and fluid multi-layered environment deeply rooted in traditional, ancestral knowledge and cultural ties across communities, thus, leveraging for best preservation mechanisms.

- In light of this, we offer a case study as an inspiration that attempts to protect ‘European soil’ by the initiatives undertaken by the European Union by collating natural heritage with cultural heritage aspects of the soil, the practices from geoconservation and the proposed way forward in terms of pan-European regional policy-making for preservation.<sup>1</sup>

## Case study

According to Morgan and McBratney (2020) and Friedrichsen et al. (2021) soil health should not be exclusively assessed by its instrumental values but also by its relational values supporting a plural valuation of soil health. Protecting soil cultural heritage is important to increase soil security through the improvement of the connectivity between soil and society (Montanarella and Panagos, 2021). Relational values of soils expand our knowledge of values generally identified as cultural ecosystem services, such as spiritual meaning, heritage, recreation, community food sovereignty, ethically appropriate food production, and aesthetic value (Friedrichsen et al., 2021). The soil cultural and natural heritage services named by the EU Soil Strategy, including recreation and aesthetics, are also deemed to underpin the European achievement of the Sustainable Development Goals (United Nations, 2022), in particular, goal 3 – to ensure healthy lives and promote well-being for all at all ages; goal 4 – to ensure inclusive and equitable quality education and promote lifelong learning opportunities for all; goal 15 – to protect, restore, and promote sustainable use of terrestrial ecosystems; goal 16 – to promote peaceful and inclusive societies for sustainable development (Keesstra et al., 2016). The rationale is that human well-being includes the fulfillment of psychological needs, and soil social values positively influence physical and mental health, education, diversity, and cultural identity, as well as the value of freedom (Field, 2016; Friedrichsen et al., 2021).

The first years of the twenty-first century saw increased international attention to the soil cultural heritage. The Council of the European Union defended soil preservation as a part of natural heritage, by issuing the document “Council Conclusions on Integrated Soil Protection” (Commission of the European Communities, 2002) and in March 2005 the EC Environment agreed to include Geodiversity and Geoheritage in the final document “Thematic Strategy for Soil Protection” (Commission

<sup>1</sup> Edoardo A.C., Costantini, *Possible policies and actions to protect the soil cultural and natural heritage of Europe*, Geoderma Regional, Vol, 32, March 2023, refer [here](#)

of the European Communities, 2006). In those years, several local governments, organizations and scientists started research projects regarding soil heritage. The International Union of Soil Sciences (IUSS), in particular, set up a Working Group on Soil Heritage and Rare Soils. A specific research network was created in Europe: the “European Cultural Heritage of Soils” (ECHO-Soil), promoted by the Katholieke Universiteit of Leuven. In order to achieve such a joint European effort, the ECHO-Soil incentive aimed at providing a forum for discussion for scientists working in the field of soil heritage, thereby providing a framework for ideas and impact evaluation, an aid in soil heritage science and education and a starting point for raising awareness.

- Therefore, we seek a clarification as to whether there is a uniform and a unanimous understanding and approach to ‘heritage’ in international legal instruments that concerns the high seas, the seabed and its resources i.e., common heritage of all mankind as well as the cultural heritage within the high seas before proceeding to embed the concept of underwater cultural heritage towards the Mining Code.

## b. Tangible v. intangible concepts of Underwater Cultural Heritage

(1) We raise our doubts as to whether it is appropriate to separate ‘tangible’ and ‘intangible’ concepts as binary concepts in the treatment of their application towards the Mining Code. Although it is widely accepted in international legal instruments of UNESCO 2001 Convention and UNESCO 2003 Convention that harmonize their concepts, in our view, it is problematic given that when not merged together, we find two problems with this terminology:

- First, as it has been discussed by State and observer delegates at the intersessional group meetings, the use of these terms create a dichotomy that does not fully express what either actually refer to. They are a useful term in framing the difference between elements that are materials and some that may not be, however, presenting these as part of a binary obfuscates the fact that they are deeply connected. Indeed, as different indigenous leaders who attended the second meeting noted, marine life possesses spiritual and other valences to their cultures and the connection between material and immaterial or tangible and intangible is more complex. In addition to that we would like to note that the scientifically ecosystemic relations we have with our environment, terrestrial and marine, is perfectly framed in these indigenous epistemologies and practices in ways that make any ‘intangible’

underwater cultural heritage also a reframing of ecosystemic services in realities.

- Second, the term 'intangible' is problematic. Indeed, in addition to creating a binary with 'tangible', it is also etymologically a term that refers to absence and has a negative valence in the English language. The use of the prefix "in-" puts this term not only in a dichotomy with 'tangible', but also in opposition. Moreover, the negative prefix "in-" also means that all elements grouped under the label 'intangible' are necessarily part of an absence and an emptiness which is decided in a discriminating manner by whoever decides what is real/tangible/material and what is not. However, if one decides what that is, how can it be translated to how all humankind perceives materiality or absence of materiality in the first place?
- Overall, these terms form part of a western genealogy of ontology that is underpinned by colonial discourse and does not include other systems of ontologies or beliefs. It therefore is lacking in its definition of a complex and global scientific and cultural system of entanglements.
- Further, we wonder if the definition of underwater cultural heritage can be improved in the direction of tackling the problem of distance and remoteness, for which it is necessary to decentring the notion of 'artifact' from the human referent (structures, buildings, artefacts and human remains) as the only worthy or valid relationship of patrimonialisation. While the notion of intangible heritage is an attractive way to move in this direction, "intangible objects" still seem too closely tied to an idea of culture that is highly centered on "products of language" such as songs, idioms, and stories.
- We further propose it would be interesting to bend the idea of heritage towards other alternative materialities, indigenous for example: non-human genealogical and ancestral models, meteorological phenomena such as storms or natural formations such as currents, streams or even elements. Perhaps in other types of environmental literacy lies the possibility of constructing other references of heritage where the seabed is not constructed as a remote space alien to culture. At the same time, the remote sensing devices of climate science and oceanography might be used to amplify the aesthetic and material register of environmental entities that might be recognized in ancestral narratives but that are difficult to capture in the western cultural understanding upon which the notion of underwater cultural heritage relies upon.

- In the third meeting, examples of national law protecting underwater cultural heritage were discussed and the facilitator requested the group to share any other examples that could serve as precedent. We would thus like to share the examples below:

## Case study

In December 2021-January 2022, the High Court of the South African Eastern Cape Division granted a local communities' request for an urgent interim injunction prohibiting Shell Exploration and seismic testing off the coast of South Africa's Eastern Cape province. The evidence brought to this case and considered by the court was that such exploration would likely damage the marine environment and thus violate the communities' (represented by the applicant) rights to a healthy and safe environment, but also their right to participate in and enjoy the cultural life of their choice, as noted in the judgement that can be found via the link below: "Members of the Amadiba traditional community are concerned that these seismic survey will upset their ancestors and impact on their cultural and spiritual relationship with the sea. They are concerned that Shell did not consult them in that regard" and "Like the Amadiba, members of the Sicambeni village, regard the sea as important to them as a site where ancestors reside".

See particularly p. 17, section [32] that point to the possible foreignness of some of these indigenous belief and note that that does not mean they should not be taken into account and dismissed because they may not neatly fit within legal language and processes that have been created without their input and sometimes without their prior informed consent: "[32] I accept that the customary practices and spiritual relationship that the applicant communities have with the sea may be foreign to some and therefore difficult to comprehend. How can ancestors reside in the sea and how can they be disturbed, may be asked. It is not the duty of this court to seek answers to those questions. We must accept that those practices and beliefs exist. What this case is about is to show that had Shell consulted with the applicant communities, it would have been informed about those practices and beliefs and would then have considered, with the applicant communities, the measures to be taken to mitigate against the possible infringement of those practices and beliefs. In terms of the constitution those practices and beliefs must be respected and where conduct offends those practices and beliefs and impacts negatively on the environment, the court has a duty to step in and protect those who are offended and the environment".

## Further Sources:

- Sustaining the Wild Coast Inc & others v. Ministry of Mineral Resources and Energy & others, 3491/2021 South Africa High Court, refer [here](#)
- Centre for Environmental Rights: Advancing Environmental Rights in South Africa, 28 December 2021, refer [here](#) [Accessed 15 May 2023]
- Strand M., Rivers N. and Snow B., “Reimagining Ocean Stewardship: Arts-Based Methods to ‘Hear’ and ‘See’ Indigenous and Local Knowledge in Ocean Management”, *Frontier of Marine Science*, Vol 9, 2022, refer [here](#)
- Strand M., Rivers N. and Snow B. “The complexity of evaluating, categorising and quantifying marine cultural heritage”, *MarinePolicy*, Vol. 148, 2023, refer [here](#)

(2) Along the same lines, considering issues of prior informed consent and indigenous stewardship, we would like to raise the practice of Rights of Nature in Ecuador and Aotearoa/New Zealand. Both countries have enshrined rights of nature within their constitutions, and these have been stewarded by indigenous communities who represent the river in question in the Aotearoa/New Zealand case and have been permitted to sue mining companies for damage done in the case of Ecuador. We specify these cases here to suggest that indigenous communities should be representatives for spaces that they have been stewarding and protecting for centuries and also suggest that we may need to consider these legal precedents when considering the rights of the seabed in the international context. We acknowledge that Rights of Nature regiments are currently being popularized in local, regional contexts that are place based and that it requires customary practice by States to make it into international legal instruments for the planetary commons but the strong practices of indigenous stewardship for the deep ocean is something yet to be clarified and examined from indigenous iterations at the International Seabed Authority meetings and even beyond such forums to consider it towards the Mining Code.

## Further Sources:

- Constitution of Ecuador, 2008, refer [here](#)
- Constitutional Court of Ecuador, Case No. 1149-19-JP/20, refer [here](#)
- Press Release: “Rights of Nature Victory in Ecuador - Los Cedros Case – Constitutional Court Upholds Rights of Nature: Court rules that mining in a protected forest is unconstitutional, violates constitutional rights of nature”, Center for Democratic and Environmental Rights, 1 December 2021, refer [here](#) [Accessed 15 May 2023],
- “Landmark Ruling Blocks Mining in Ecuadorian Forest, Citing Rights of Nature”, YaleEnvironment360, 3 December 2021, refer [here](#) [Accessed 15 May 2023],
- The Te Awa Tupua (Whanganui River Claims Settlement) Bills, refer [here](#)
- “Innovative bill protects Whanganui River with legal personhood”, New Zealand Parliament/Pāremata Aotearoa, 28 March 2017, refer [here](#) [Accessed 15 May 2023],
- Tanasescu, M. “When a River is a Person: From Ecuador to New Zealand, Nature gets its Day in Court”, Open Rivers: Rethinking Water, Place and Community, Vol. 8, 2017, refer [here](#)

(2) We object to the time element that flows from the definition of UNESCO 2001 and 2003 Convention, respectively. Punctuating underwater cultural heritage within a given time frame completely undervalues and negates the ways in which people perceive and define time without the considerations of the non-western developing States, multiple regional communities ways to function and accept time in accordance to the plurality of calendars that are of ancestral and cultural significance but also indicate long-term and deep associations to ancient civilizations. Thus, we request the facilitator to remove the time element completely.



## c. Duty to protect and preserve underwater cultural heritage Contractor obligations and duties

Overall, throughout the meetings, we have found that the discussion seemed to focus on the CCZ as a site where exploration is taking place and where exploitation will take place. We wonder how these issues to ensure the protection and preservation of underwater cultural heritage are reasoned upon when it comes to considering other sites and contexts that are necessarily affected by the exploitation of the CCZ. Indeed, the contractors' ships, which will travel to the CCZ, will produce pollution in its consumption of fuel and noise pollution that may impact the marine environment and particularly some mammals, their communication and migration patterns; the noise pollution of the shipping industry is known to affect many creatures' health and their socio-cultural and migratory patterns as well as feeding habits.<sup>2</sup> Some of these are also creatures that Pacific indigenous leaders have mentioned as sacred in their cultures during our intersessional meetings. This may also include the noise and other pollution produced by the ship and extractive machinery used to mine the CCZ. Additionally, given the current scientific insecurity considering plume dispersion impact, if plume and mining waste are dispersed in shallow subtidal zones, they may travel and impact underwater cultural heritage outside of the mining site itself, potentially as far as the Hawaiian and the Mexican EEZ and impact underwater cultural heritage and marine ecosystems existing within.

We thus ask whether it would be possible:

- (1) To clarify where and when are the sites and the times during which the preservation of UCH will be required from the contractors.
  - (2) If they are not included, to include travel to the mining site and sites that maybe impacted by the mining itself and its waste and discharge.
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<sup>2</sup> Erbe, C. et al. “The Effects of Ship Noise on Marine Mammals—A Review”, *Frontiers of Marine Science*, Vol. 6, 2019, refer [here](#)

## APPENDIX III

### Singapore's preliminary comments

| Bullet point (BP) | Textual proposals   | Singapore's textual proposals/comments   |
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| 1, 5, 6 and 11    | <p><b>1. Revise draft exploitation regulation 35 to say the following (deleting the reference to paleontological matters, given that there did not seem to be active support for the concept in this working group, and inserting a new legal term of art into the draft regulation):</b></p> <ul style="list-style-type: none"> <li>• “The Contractor shall [immediately] notify the Secretary-General in writing within 24 hours of any finding in the Contract Area of any human remains, <u>or any Object or Site of an Archaeological archaeological or Historical Nature, historical [and paleontological] nature, or any object or site of a similar nature,</u> and its location, including the preservation and protection measures taken. The Secretary-General shall transmit such information, [within 7 Days of receiving it] to the Sponsoring State, to the State from which the remains, <u>or Object or Site of an Archaeological or Historical Nature [object or site]</u> originated, if known, to the Director General of the United Nations Educational, Scientific and Cultural Organization and to any other competent international organization. Following the finding of any such human remains, <u>object or site or Object or Site of an Archaeological or Historical Nature</u> in the Contract Area, and in order to avoid disturbing such human remains, <u>or Object or Site of an Archaeological or Historical Nature</u> <del>object or site</del>, no further Exploration or Exploitation shall take place, within a reasonable radius, [to be determined by the Authority [in consultation with the Contractor] until such time as the Council decides otherwise, after taking into account the </li> </ul> | <p><b>Singapore's textual proposals <u>underlined in purple</u>:</b></p> <ul style="list-style-type: none"> <li>• <b>Throughout the DRs, including DR 35:</b> Amend references to “Object or Site of an Archaeological or Historical Nature” to “object or site of an archaeological <u>and</u> historical nature”. An alternative for consideration is “object <u>of an archaeological and historical nature,</u> or site of an archaeological <u>and</u> historical nature”.</li> </ul> <p>[Comment: See next row of the table below on our rationale for not capitalising this term.]</p> <p><b>Rationale &amp; other comments:</b></p> <p>As a preliminary point, we note that Article 149 of UNCLOS uses the following language: “<b>objects</b> of an archaeological <b>and</b> historical nature found in the <b>Area</b> shall be <b>preserved or disposed of</b> for the benefit of mankind as a whole ...” (<i>emphases in bold</i>).</p> <ul style="list-style-type: none"> <li>• We propose amending “Archaeological or Historical Nature” to “archaeological <u>and</u> historical nature” to be more consistent with the language used in</li> </ul> |

views of the State from which the remains originated, the Director General of the United Nations Educational, Scientific and Cultural Organization or any other competent international organization. [If the Council decides that exploration or exploitation cannot continue, the Contractor shall be compensated, including but not limited to the vicarious areas of equivalent size or value elsewhere or appropriate waiver of fees.]”

**5. Revise draft exploitation regulation 48bis(2) to say the following (ensuring alignment with the legal term of art proposed above, and reflecting existing UNCLOS and exploration regulation language on the duty to protect under article 149):**

- The purpose of test mining is to ensure that effective protection of the marine environment from harmful effects is ensured. Test mining projects shall as a general rule provide evidence that appropriate equipment is available to ensure the effective protection of the Marine Environment in accordance with Article 145 and the duty to protect ~~Objects or Sites of an Archeological or Historical Nature Underwater Cultural Heritage (specifically objects of an archaeological and historical nature) under Article 149~~

**6. Revise draft exploitation regulation 49 to say the following (ensuring alignment with the legal term of art proposed above, and reflect obligations under article 149 of UNCLOS):**

- A Contractor shall take all the necessary and appropriate measures to protect and preserve the Marine Environment and coastlines by preventing, reducing and controlling pollution and other hazards, including marine litter and underwater noise, from its activities in the Area. This is to be done in accordance with its Environmental Management and Monitoring Plan and all relevant Rules of the Authority, the relevant applicable Regional Environmental Management Plan, taking account of the applicable Guidelines. ~~If a potentially polluting wreck is discovered and it is an Object or Site of an Archeological or Historical~~

UNCLOS.

- We note that the current textual proposals expand UNCLOS Article 149 and 303 references to “**objects** of an archaeological and historical nature” alone, to include “**sites**” (and “human remains”).
  - To be more consistent with UNCLOS/avoid creating a new term not found in UNCLOS, we suggest that “object [of an archaeological and historical nature](#), or site of an archaeological [and](#) historical nature” could be an alternative to “object or site of an archaeological [and](#) historical nature” that the group may wish to explore.
  - As a matter of accuracy, we had concerns with an earlier iteration of some of the textual proposals referring to and applying **Article 149** wholesale to such “sites” (which is not referred to in Article 149). That said, we note that such references to “sites ... [under][consistent with] Article 149” have since been removed alongside the latest set of proposed deletions in [green highlight](#). [\[see DR 48bis\(2\)/BP 5 and DR 49/BP 6\]](#)

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|   | <p><del>Nature object of an archaeological and historical nature, then the duty to protect such wreck heritage must also be considered consistent with Article 149.</del></p> <p><b>11. Revise draft exploitation regulation 28(3) to say the following (ensuring alignment with the legal term of art proposed above):</b></p> <ul style="list-style-type: none"> <li>Notwithstanding paragraph 1 above, the Contractor shall [temporarily] [immediately] [reduce or] suspend production whenever such reduction or suspension is required to protect the Marine Environment from [Serious Harm or a threat of Serious Harm] or to protect human health and safety [to protect the Marine Environment from Serious Harm or a threat of Serious Harm, to protect human health and safety <del>or to protect human remains, or Objects or Sites of an Archaeological or Historical Nature</del> <del>objects or sites of archaeological or historical nature</del>] [upon the receipt of emergency order pursuant to regulation [4(4) or on the Contractor’s own decision that maintaining the level of production would result in Serious Harm or a threat of Serious Harm.] A Contractor shall notify the Secretary-General [and the Sponsoring State or States] [States] of such a reduction or suspension of production as soon as is practicable and no later than [72] [24] hours after production is [reduced or] suspended.</li> </ul> | <ul style="list-style-type: none"> <li>As the DRs pertain to the <b>Area</b>, our view is that it might be more appropriate to use language from Article 149 (which is part of Section 3 of Part XI – Principles Governing the Area) as compared to Article 303 (a general provision which pertains to other maritime zones), as Article 149 is arguably the provision which informs how the Article 303 “<b>duty to protect</b>” should be interpreted/applied with regard to objects of an archaeological and historical nature found in the Area, i.e. by a State taking measures in satisfaction of the Article 149 requirement that such objects “shall be <b>preserved or disposed of</b> for the benefit of mankind as a whole ...” In this regard, we would propose that relevant DRs should incorporate language from Article 149 regarding the obligation to “<b>preserve or dispose of</b>” such objects, in place of (or in addition to) “<b>protect</b>” / “<b>the duty to protect</b>”. That said, we note that these references to “duty to protect” and “protect” have since been removed alongside the latest set of proposed deletions in <b>green highlight</b>. [see DR 49/BP 6 and DR 28(3)/BP 11]</li> </ul> |
| 2 | <p><b>2. Include in the Schedule on the Use of Terms the phrase "Object or Site of an Archaeological or Historical Nature" and define it as follows (drawing from the relevant UNESCO definition(s), while keeping "human remains" separate from the term and its definition):</b></p> <ul style="list-style-type: none"> <li>"All traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously, <del>for at least 100 years</del> such as: (i) sites, structures, buildings, and artifacts, together with their archaeological and natural context; (ii) vessels, aircraft, other vehicles or any part thereof, their</li> </ul>  | <p><b>Singapore’s textual proposals <u>underlined in purple</u>:</b></p> <ul style="list-style-type: none"> <li><b>Schedule on the Use of Terms:</b> Suggest to remove the phrase/definition of "Object or Site of an Archaeological or Historical Nature" (if so, the term should also not be capitalised throughout the DRs).</li> <li><b>Throughout the DRs:</b> Remove capitalisation in the term “<u>object or site of an archaeological and historical nature</u>”.</li> </ul>   |

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|                    | <p>cargo or other contents, together with their archaeological and natural context; and (iii) objects of prehistoric character"</p>   | <p><b>Rationale:</b></p> <ul style="list-style-type: none"> <li>• First, our view is that such a definition is not necessary. We note that such a definition is also not included in the exploration regulations, even though the same references/terms were included.</li> <li>• Second, we have some reservations with attempting to create/define a new term not found in UNCLOS, at the ISA platform.</li> <li>• Third, looking at the current proposed definition, we have concerns with (1) conflating the concepts of "objects" and "sites" (of an archaeological and historical nature), given the uncertainty as to the application of Article 149 to "sites", and (2) conflating the term "object or site of an archaeological and historical nature" with Underwater Cultural Heritage, given that the proposed definition largely maps the definition of Underwater Cultural Heritage in the 2001 UNESCO Convention. We also highlight in this regard that the 2001 UNESCO Convention is not a universal convention, with only 72 parties.</li> </ul> |
| <p>3, 4 and 10</p> | <p><b>3. With respect to proposed references to UCH (and UCH-related matters) in draft exploitation regulations and associated Annexes pertaining to the protection and preservation of the marine environment, delete proposed references to UCH (and UCH-related matters) in:</b></p> <ul style="list-style-type: none"> <li>• draft exploitation regulation 44(1)(a)(v) (which proposes expanding the definition of "Marine Environment" to include UCH, a proposal that in my view goes beyond the understood scope of what the Marine Environment is, i.e., environmental/marine rather than anthropogenic/anthropocentric)</li> </ul> | <p><b>Comments:</b></p> <p>We agree with the proposed deletions of references to UCH (and UCH-related matters) in these draft regulations/definitions pertaining to the marine environment.</p>   |

- draft exploitation regulation 46bis(2)(b) (which folds UCH into the definition of "Marine Environment")
- draft exploitation regulation 46bis(4)(b) (which references an affirmative obligation of a Contractor to conduct a survey of the seabed for UCH, which at least one delegation has explicitly opposed)
- draft exploitation regulation 47(3)(b) (which also references an affirmative obligation of a Contractor to conduct a survey of the seabed for UCH)
- draft exploitation regulation 48(3)(g)(i) (which references "archaeological impacts" without explicitly connecting the reference to UCH)
- Section 4.2 of Annex IV (which focuses on geophysical/oceanographic conditions of a site and does not lend itself well to anthropogenic/anthropocentric UCH references)
- Section 4.3 of Annex IV (which requires the conducting of seabed surveys for UCH, and which is placed in a Section that focuses on geophysical/oceanographic conditions of a site)
- Annex IVbis(c) (which folds UCH under the notion of "environmental setting" as part of a Scoping Report, similar to the above-mentioned proposal to include UCH in the definition of "Marine Environment")
- Annex VII(2)(c)(bis) (which requires the conducting of baseline studies for UCH and folds such studies under the concept of environmental baseline data as part of the suite of information to be captured in an EMMP)

**4. Delete proposed definitions for "Best Archaeological Practices," "Intangible Cultural Heritage," and "Underwater Cultural Heritage" in the Schedule; delete the reference to a survey of the seabed to identify objects of an archeological and historical nature in the definition for "Environmental Management System" in the Schedule; and delete the reference to baseline studies for UCH in the definition for "Environmental Effect" in the Schedule**

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|            | <p><b>10. With respect to proposed references to UCH (and UCH-related matters) in draft exploitation regulations pertaining to implementation, compliance, and enforcement, delete proposed references to UCH (and UCH-related matters) in:</b></p> <ul style="list-style-type: none"> <li>• draft exploitation regulation 99(1) (which folds UCH into the concept of Marine Environment)</li> <li>• draft exploitation regulation 102(2)(a) (which folds UCH into the concept of environmental data, whereas the draft exploitation regulations do not typically take an anthropogenic/anthropocentric approach to defining environmental data)</li> <li>• draft exploitation regulation 102(2)bis (which refers to best archaeological techniques, which is a concept closely related to the term "Best Archaeological Practices" that is proposed above for deletion from the Schedule)</li> <li>• draft exploitation regulation 102(2)ter (which requires the conducting of a survey of the seabed for UCH)</li> </ul>  |  |
| 7, 8 and 9 | <p><b>7. Revise Section 6.2.5 of Annex IV to say the following (ensuring alignment with the legal term of art proposed above, without explicitly mandating the conducting of a seabed survey or a baseline study for UCH):</b></p> <ul style="list-style-type: none"> <li>• List human activities in the project area (e.g., traditional navigation routes, migratory paths of culturally significant marine species, sacred sites and waters associated with ritual or ceremonial activities of Indigenous Peoples and local communities as well as known <u>or suspected Objects or Sites of an Archaeological or Historical Nature Underwater Cultural Heritage</u>)</li> </ul> <p><b>8. Revise Section 6.3 of Annex IV to say the following (ensuring alignment with the legal term of art proposed above, without explicitly mandating the conducting of a seabed survey or a baseline study for UCH):</b></p> <ul style="list-style-type: none"> <li>• List any <u>Objects or Sites of an Archaeological or Historical Nature sites</u> <del>of archaeological or historical</del></li> </ul> | <p><b>Comments:</b></p> <p>We note that the original textual proposals in these three DRs (minus those in <b>green highlight</b>) were, amongst others, intended to remove an explicit mandate to conduct a seabed survey or baseline study for UCH as was previously discussed by this working group. However, the previous iteration of <b>Section 6.3 of Annex IV</b> includes the line: "Copies of surveys of the project area shall be submitted with notes about anomalies that may indicate the presence of [Objects or Sites of an Archaeological or Historical Nature] [objects of an archaeological and historical nature] that should be subject to further research before any potentially destructive activities occur". This presupposes that a survey has been done and that such a survey can at least identify anomalies which might need</p> |



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|    | <p>significance that are known to occur <del>or may occur</del> within the potential area of impact. Provide a map as applicable showing known <u>Objects or Sites of an Archaeological or Historical Nature</u> <del>archaeological and historical sites</del> in relation to proposed operations and note any areas of interaction or cumulative impact. <del>Known human connections to or uses of the area should also be acknowledged. Copies of surveys of the project area shall be submitted with notes about anomalies that may indicate the presence of</del> <u>Objects or Sites of an Archaeological or Historical Nature</u> <del>objects of an archaeological and historical nature that should be subject to further research before any potentially destructive activities occur.</del></p> | <p>further research. Preliminarily, our view is that the proposed deletions in <b>green highlight</b> seem to better clarify the intention of the textual proposals, and on that basis, we can agree with the deletions (although if this is the agreed approach, for consistency, the group may also wish to consider whether the <b>blue highlight</b> should be deleted/retained).</p>   |
|    | <p>9. Revise Section 9.3 of Annex IV to say the following (ensuring alignment with the legal term of art proposed above, without explicitly mandating the conducting of a seabed survey or a baseline study for UCH, and deleting the reference to paleontological matters):</p> <ul style="list-style-type: none"> <li>Describe, as applicable, potential impacts to <u>Objects or Sites of an Archaeological or Historical Nature</u> <del>sites of archaeological, paleontological or historical significance</del> that are known to occur within the potential area of impact, along with proposed management measures <del>and a description of residual impacts.</del></li> </ul>  |   |
| 12 | <p>12. [Original proposal] For "intangible" UCH, rely on references to the traditional knowledge of Indigenous Peoples and local communities, as part of the definition of "Best Environmental Practices," as well as on references to sociocultural uses and sociocultural impacts in Annex IV. There might also be the need to have corresponding references (perhaps under draft exploitation regulation 2 as a principle/approach) to the protection, promotion, and upholding of the rights of the holders of such traditional knowledge in the implementation of the exploitation regulations, including their right of free, prior and informed consent as well as their right to</p>  | <p><b>Comments:</b></p> <p>We are in principle agreeable with the original proposed approach in <b>bold</b> (in lieu of a definition for "intangible UCH" in the Schedule). Our view is that the concept of "intangible UCH" or marine-related traditions and practices could be captured through "relevant traditional knowledge of Indigenous Peoples and local communities" and references to sociocultural uses and sociocultural impacts in Annex IV. We note that the BBNJ Agreement also uses the phrase "relevant traditional knowledge of Indigenous Peoples and local communities", and does not explicitly</p> |

participate in all decision-making potentially affecting their knowledge and interests, similar to language in the Post-2020 Global Biodiversity Framework of the CBD and associated CBD COP decision(s) as well as in the BBNJ instrument.

[Revised proposal] For "intangible" UCH, more discussion is needed by the Council, including with respect to whether such UCH should be folded into the concept of traditional knowledge of Indigenous Peoples and local communities as part of the definition of "Best Environmental Practices" or should be addressed in a separate/standalone fashion in the exploitation regulations, recognizing the need to balance out flexibility in the implementation of the exploitation regulations on the one hand with the full, respectful, and rights-based reflection of all cultural connections to and valuations of the marine environment (beyond object-, biodiversity-, or site-specific traditional knowledge) on the other hand.

reference "intangible UCH" (or UCH).

We are also not opposed in principle to the broad concept of the participation of indigenous peoples and local communities in decision-making that affects their rights or interests, but we will wait for specific revised textual proposals before providing further comments.