

## **Briefing Note for Thematic Discussion on “Intangible Cultural Heritage definition”**

*Prepared by the Delegation of the Federated States of Micronesia*

The purpose of this note is to provide background and guiding questions for the thematic discussion on “Intangible Cultural Heritage definition” that will take place on 27 March 2024, during the first part of the 29th Session of the Council of the International Seabed Authority.

For the thematic discussion, delegations are invited to consider the issue of “intangible” cultural heritage in connection with activities in the Area, particularly (but not necessarily limited to) the matter of defining such heritage for the purposes of the exploitation regulations of the Mining Code of the International Seabed Authority.

Delegations are reminded that there has been an intersessional working group that has met to discuss the topic of “underwater cultural heritage” over the last year. The intersessional working group has discussed the issue of underwater cultural heritage through two main lenses: “tangible” underwater cultural heritage (e.g., human remains, wrecks, artifacts) and “intangible” underwater cultural heritage (e.g., sacral and cultural values broadly associated with the marine environment, creation/origin stories stemming from the marine environment).

The intersessional working group has made some progress on the issue of “tangible” underwater cultural heritage. Specifically, the intersessional working group has discussed a possible definition for such “tangible” underwater cultural heritage, which could include (among others) “tangible” heritage that is also associated with “intangible” cultural heritage. The intersessional working group has also considered existing draft exploitation regulation 35 and addressed, among other things, the possibility of establishing a mechanism/process on reporting, notification, and decision-making in the event that “tangible” underwater cultural heritage is encountered during exploitation in the Area.

However, the intersessional working group has not made as much progress on the issue of “intangible” underwater cultural heritage, particularly so-called “pure intangible” underwater cultural heritage (i.e., “intangible” underwater cultural heritage that is not directly associated with any “tangible”/physical/tactile element of the Area and surrounding marine environment). The Members of the International Seabed Authority will benefit from a focused discussion of this type of underwater cultural heritage, taking fully into account the inputs from all interested observers, including, in particular, those of representatives of Indigenous Peoples and local communities for whom such “intangible” underwater cultural heritage is vital.

For the thematic discussion, delegations are invited to address one or more of the following questions:

1. Should the exploitation regulations address “intangible” underwater cultural heritage?
2. If the exploitation regulations are to address “intangible” underwater cultural heritage, then should the concept be defined in the exploitation regulations, and if so, what would be an appropriate definition?

3. Assuming that the exploitation regulations address “intangible” underwater cultural heritage, what would such regulatory language look like? Delegations are invited to consider, among other things, who will and/or how to identify such “intangible” underwater cultural heritage, as well as what steps should be taken under the exploitation regulations to protect or otherwise address such “intangible” underwater cultural heritage once encountered/identified.

Delegations are reminded that the existing draft exploitation regulations already reference, in various locations and to varying degrees, the matter of the traditional knowledge of Indigenous Peoples and local communities as well as the identification and protection of traditional and cultural interests and rights associated with exploitation activities in the Area. Delegations are invited to consider, when responding to the guiding questions above, whether such existing references could inform their consideration of the issue of “intangible” underwater cultural heritage, without prejudice to possible refinements to those existing references for other contexts under the exploitation regulations.

Delegations are also invited to consider, when responding to the guiding questions above, whether it is appropriate to differentiate between “tangible” and “intangible” underwater cultural heritage in the exploitation regulations.

For a summary of the work of the intersessional working group on underwater cultural heritage prior to the second part of the 28th Session of the Council of the International Seabed Authority, as prepared by the facilitator of the intersessional working group, please see the following link: <https://www.isa.org.jm/wp-content/uploads/2023/06/Underwater-Cultural-Heritage-Outcomes-report.pdf>

For a summary of the work of the intersessional working group on underwater cultural heritage between the second and third parts of the 28th Session of the Council of the International Seabed Authority, as prepared by the facilitator of the intersessional working group, please see the following link: <https://www.isa.org.jm/wp-content/uploads/2023/10/UCH.pdf>

For a summary of the work of the intersessional working group on underwater cultural heritage between the third part of the 28th Session and the first part of the 29th Session of the Council of the International Seabed Authority, as prepared by the facilitator of the intersessional working group, please see below:

### **30 November 2023**

\* On 30 November 2023, starting at 9PM (EST / NY Time), participants (comprising of a number of representatives from Members and observers of the ISA) met to discuss what the intersessional working group on underwater cultural heritage ("UCH") might do during the current intersessional period, including with respect to the possibility of the group submitting a set of textual proposals on UCH to the ISA Council by the 20 December 2023 deadline for incorporation in the consolidated draft text of the exploitation regulations.

\* Participants generally agreed that it might be premature and a bit hasty for the group to submit textual proposals to the Council by the 20 December 2023 deadline.

\* Participants expressed an interest in the group having focused and deliberate discussions during the entirety of the current intersessional period on various elements pertaining to UCH, with some of the participants raising the possibility of arriving at a definition for UCH -- or perhaps for just "cultural heritage" -- that draws from the World Heritage Convention ("WCH") and related guidelines (as opposed to drawing from UNESCO Conventions on cultural heritage), given the universal nature of the WCH (at least in terms of ratifications).

\* A number of the participants had a useful exchange on the challenges of focusing on just the "underwater" component of UCH as opposed to addressing "cultural heritage" in general, as well as the need to have a clearer view of what is meant by the "intangible" elements of (U)CH, with a participant expressing the view that "intangible" elements (e.g., rights) might be better addressed in terms of "cultural heritage" as a whole rather than taking a bespoke approach to such "intangible" elements with respect to UCH.

\* A participant offered to prepare and circulate to the group an informational paper on the WCH and how it can serve as guidance for developing a definition for "cultural heritage," inclusive of "intangible" elements and not necessarily restricted to the "underwater."

\* Another participant offered to prepare and circulate to the group an informational paper on how the Marine Environment (as a legal term of art for the exploitation regulations) can include components of (U)CH, including in the definition for the term.

\* Participants agreed to try to schedule another meeting of the group, potentially toward the end of next week (e.g., on 7/8 December), with that meeting focusing on the informational papers referenced above, a discussion of a possible definition for (U)CH, and an examination of related intangible elements (ideally with the participation of representatives of Indigenous Peoples and local communities, particularly those who prepared and circulated the non-paper on intangible cultural heritage during the previous intersessional period).

\* The facilitator of the intersessional working group also promised to ask the ISA Secretariat about whether it will still be possible to submit textual proposals during and after the first part of the 29th Session of the ISA Council next March, as this was not explicitly decided one way or another by the Council in its meeting last month.

### **7 December 2023**

\* On 7 December 2023 (EST / NY Time), participants (comprising of a number of representatives from Members and observers of the ISA as well as a contractor) met with the intent to discuss, among other things, a possible definition for (underwater) cultural heritage that draws on the World Heritage Convention ("WHC"); as well as a discussion of intangible elements associated with such a definition, drawing also on the non-paper submitted by representatives of Indigenous Peoples and local communities from the Pacific during the previous intersessional period.

\* A representative of The Ocean Foundation circulated and presented an information paper that discusses, among other things, definitions for cultural heritage drawing from the World Heritage Convention. The Ocean Foundation pointed out that the WHC has a definition of "cultural heritage" that focuses on monuments, groups of buildings, and other physical sites. The definition could be expanded to include "intangible" elements, although it might be more appropriate to work on the basis of the 2009 UNESCO Framework for Cultural Statistics, which might be more amenable to "intangible" elements. A participant queried why the UNESCO Framework appears to exclude intangible cultural heritage such as those connected with festivals and celebrations. It was suggested that this might be because the Framework is numerical based. It was also suggested that due to the broad nature of intangible cultural heritage, the Framework might be focused instead on tangible/physical cultural heritage, albeit possibly with some intangible elements (e.g., coral reefs and other marine biological diversity might have intangible cultural elements/associations).

\* A representative of Spain promised to share a paper that discusses, among other things, terms of art and other definitions for (underwater) cultural heritage, with a focus on human remains and cultural heritage.

\* The representative of Spain briefly presented the paper prior to its circulation. The paper discusses UNCLOS, the WHC, the 2001 and 2003 UNESCO Conventions on underwater cultural heritage and intangible cultural heritage, and ICOMOS. The paper suggests that the exploitation regulations of the ISA Mining Code, in relevant provisions, should reference and address "human remains and cultural heritage" in the Area, with the understanding that such a phrase/concept refers to "[a]ll traces of human existence found in the Area -- together with their archaeological and natural context -- having a cultural, historical or archaeological character, or associated with the intangible cultural heritage recognized by communities, groups and, in some cases, individuals, such as human remains, objects of prehistoric character, sites, structures, buildings, artifacts, vessels, aircraft, other vehicles or any part thereof, their cargo or other contents." These references would build on a generally accepted understanding of underwater cultural heritage (drawing on the work/references in the above-mentioned instruments), but without imposing any particular temporal dimension for what qualify as human remains and cultural heritage. The references would be limited to tangible cultural objects only, but would include those tangible cultural objects associated with intangible cultural heritage; the regulation of purely intangible matters, such as the protection of sacred or venerated sites, would be done by other instruments, such as the BBNJ Agreement and the 2003 UNESCO Convention on Intangible Cultural Heritage.

\* Participants had a rich discussion on the presentations by The Ocean Foundation and Spain. Participants noted the need to flesh out the concept of intangible cultural heritage as a textual element in the exploitation regulations, recognizing that the WHC focuses on human-made monuments, buildings, and sites; as well as human-made works associated with nature (rather than being solely natural elements), whereas the UNESCO Convention(s) refer(s) to cultural knowledge, cultural expressions, cultural heritage, and similar intangible elements. The point was also raised about the importance placed by Indigenous Peoples on the deep sea itself, separate from any human-made/human-centric objects, sites, and similar elements; and about

how discussions of underwater cultural heritage have typically addressed tangible elements while not giving proper consideration to intangible cultural connections to the deep sea. The point was also made that environmental processes are viewed by Indigenous Peoples as being associated with cultural stories and perspectives, even if the processes are not themselves human-made or human-centric, and there is a need to reflect these worldviews in an appropriate manner in the exploitation regulations. It was further stressed that existing intergovernmentally-agreed instruments have not necessarily benefitted from proper engagement with these worldviews, which makes it challenging to cite existing instruments as guidance for the treatment of intangible underwater cultural heritage in the exploitation regulations.

\* It was noted that it might not be appropriate to address "pure" intangible cultural heritage elements through specific regulatory text in the exploitation regulations, as that might have broader implications for intangible cultural heritage. Rather, the focus should be on taking a more practical approach to identifying intangible cultural heritage that are associated with tangible elements of the Area, while observing the need to be protective. For "pure" intangible cultural heritage, it might be useful to take the approach of establishing preserved areas for sacred/venerated sites, rather than inserting "pure" intangible cultural heritage into references (and/or a defined term of art) for "human remains and cultural heritage."

\* It was stressed that there is still a need to have a full consideration of "pure" intangible underwater cultural heritage, especially with respect to conducting surveys, environmental impact assessments (particularly consultations for them), and similar measures and activities which could impact such intangible cultural heritage. There would also be a need to elevate these considerations to relevant decision-making processes associated with activities in the Area.

\* It was suggested that the next virtual meeting of the intersessional working group on underwater cultural heritage focus on the information paper circulated by representatives of Indigenous Peoples and local communities from the Pacific during the previous intersessional period, including a discussion on free, prior, and informed consent and other elements associated with intangible cultural heritage.

\* It was noted that with respect to the need to be practical with respect to intangible underwater cultural heritage and taking a protective approach to matters, Indigenous Peoples are trying to find solutions to keeping the planet in balance and are trying to offer Indigenous perspectives on this balance, including in the regulatory space of the ISA. It was stressed that the ISA must be open to Indigenous concepts and Indigenous perspectives, and that such an openness will facilitate the conditions for effective collaboration among all ISA Members and stakeholders to address Indigenous views on activities in the Area.

\* Participants that had presented/circulated information/proposal papers, along with other interested participants, agreed to discuss separately the various papers with the aim of possibly putting together textual proposals for the consideration of the intersessional working group in its next virtual meeting.

**29 February 2024**

\* On 29 February 2024, starting at 5PM (EST / NY Time), the intersessional working group on underwater cultural heritage ("UCH") met virtually for about an hour and a half. Participants included Members and Observers of the ISA, as well as a Contractor. Members of the ISA Secretariat as well as the outgoing ISA Council President were also present in the meeting.

\* The meeting agenda contained four items: 1) a report back from members of the group who might have had sideline conversations about UCH (including work on possible textual proposals) in the period between the 29 February virtual meeting and the previous virtual meeting of the group in December 2023; 2) a presentation by Spain of its second non-paper on UCH, and a discussion of the non-paper as well as other documents circulated previously in the working group by other members; 3) a discussion of the UCH-related elements of the consolidated draft text and related "suspense document" for the draft exploitation regulations released a short while earlier by the outgoing ISA Council President; and 4) a discussion of the modalities and scope for the informal-informals on "Intangible Cultural Heritage definition" proposed by the outgoing ISA Council President for the second week of the 1st Part of the 29th Session of the ISA Council.

\* With respect to the report back from members on possible sideline conversations about UCH between the December 2023 virtual meeting and the present virtual meeting, there were no updates.

\* With respect to Spain's second non-paper (which was previously circulated to the group via email), the representative of Spain prefaced their presentation of the second non-paper by noting that Spain has updated its first non-paper's proposed definition of the term of art "human remains and cultural heritage," primarily to limit the scope of the term to human remains and cultural heritage that have been underwater for at least 100 years, which is a timeframe used in the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage.

-- For the second non-paper, the representative of Spain explained that Spain proposes a revision of draft exploitation regulation 35 to institute a "practical system of protection" for "human remains and cultural heritage" found in the Area (as defined in the first non-paper, per the reference above), inclusive of a system of notification and cooperation involving Sponsoring States and other States Parties as well as links to UNESCO and other competent intergovernmental organizations and the sharing of information with non-governmental organizations and representatives of Indigenous Peoples and local communities.

-- Spain's second non-paper contains a schematic that lays out the proposed system of protection in as simplified a manner as possible, starting from the discovery of human remains and/or cultural heritage by a Contractor and a pausing of the Exploitation activity in and within a reasonable radius of the site of discovery; followed by a mandatory notification to the ISA SG and the Sponsoring State of the Contractor; then by a notification by the ISA SG to all States Parties, the Director General of UNESCO, and all ISA-accredited observers; then by a declaration of interest to the ISA SG by one or more States Parties in the human remains and/or cultural heritage discovered by the Contractor, particularly those States Parties that can demonstrate a verifiable link to the discovered remains/heritage; then by a convening of an "Interested Group" comprised of the interested States Parties, the Contractor, the ISA SG, the DG of UNESCO, and ISA-accredited Observers to make recommendations to the ISA Council on whether the Exploitation activity should resume, a time extension is needed for further

consideration, or the remains/heritage are to be preserved via the designation of an Area of Particular Environmental Interest or an Area of Particular Cultural Interest; and finally by a decision of the Council, taking into account the aforementioned recommendations of the "Interested Group", with compensation owed to the Contractor if the Council decides that Exploitation will not continue in the area of discovery.

-- The representative of Spain emphasized that the second non-paper focuses on "tangible" human remains and "tangible" cultural heritage, including those with associated "intangible" cultural heritage/elements. For Spain, the best way to address "pure" "intangible" cultural heritage, such as legends, stories, lore, and sacred understandings of the marine environment of the Area as practiced/held by Indigenous Peoples and local communities, is to follow the model of the BBNJ Agreement, which contemplates the establishment of area-based management tools in areas beyond national jurisdiction (inclusive of the Area) and the conducting of environmental impact assessments based on, among other things, the relevant traditional knowledge of Indigenous Peoples and local communities. Spain's second non-paper's proposal for a "practical system of protection" -- particularly as reflected in a revised draft exploitation regulation 35 -- would focus instead on physical/tactile/concrete human remains and cultural heritage discovered/encountered in the Area by Contractors.

-- A number of members of the intersessional working group expressed support for Spain's proposed re-insertion of the timeframe of "at least 100 years" in its definition of "human remains and cultural heritage," which could be a useful yardstick to characterize objects and sites in the Area as having an archaeological or historical nature, in accordance with article 149 of UNCLOS, as well as be suitably connected to salvage considerations under article 303 of UNCLOS. It was stressed, however, that the issue of States Parties having a "verifiable link" to discovered human remains and/or cultural heritage -- particularly as an articulation of the language in article 149 of UNCLOS on the "preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin" -- has not been defined or definitively addressed under UNCLOS.

\* With respect to a discussion of the outgoing ISA Council President's consolidated draft text and "suspense document," members of the group did not delve into them during the meeting. It was mentioned that the consolidated draft text does reflect a number of textual edits that came out of the working group prior to the third part of the 28th Session of the ISA Council last year but were not reflected in the compilation document for that Council Session.

\* With respect to the proposed modalities and scope for the informal-informals on UCH scheduled for the second week of the first part of the 29th Session of the ISA Council, members of the group had an extensive discussion. Several members expressed concerns about -- and indicated that they did not support -- the proposed modality for the informal-informals in which only ISA Members would be allowed to make interventions during the informal-informals, with Observers allowed only to be present during the informal-informals. It was pointed that for the informal-informals on UCH in particular, there needs to be full participation by Indigenous Observers, and it would be difficult for the informal-informals to have a full understanding of Indigenous issues and views pertaining to UCH if Indigenous Observers are unable to participate fully in the informal-informals. In response, it was noted that all Observers can contribute to the work of the informal-informals through written inputs (which could be posted online as well as circulated directly to ISA Members for consideration during the informal-informals) as well as

through statements in the plenary of the ISA Council as well as in meetings of informal working groups of the ISA Council. However, it was also stressed that the informal-informals are meant to feature focused negotiations on technical and fine details pertaining to UCH, including textual edits, which would then be reported out to the broader ISA Council for consideration and endorsement, and so it might be too late for Observers to influence the work of the Council if they are to wait until that latter stage to be able to make interventions. It was further stressed that Indigenous Peoples and local communities particularly value face-to-face discussions on matters impacting them and their interests, such as UCH. It was stressed that the history of erecting barriers to full participation of Indigenous Peoples in decision-making fora on matters impacting them and involving their values, knowledge, practices, and worldviews must be fully taken into account when developing modalities for discussions on UCH.

-- A suggestion was made that Indigenous Peoples and local communities could be invited to be "expert witnesses" in the UCH informal-informals, where they could present to the informal-informals and/or answer questions raised by ISA Members during the informal-informals. Another suggestion was made to take an approach akin to the "Arria formula" informal meetings of the UN Security Council. An additional suggestion was made that while the ISA Council might adopt a particular recommended approach to all the scheduled informal-informals, each informal-informal can decide (perhaps on a non-objection basis) whether to modify that approach for itself, including allowing Observers to make interventions during the informal-informals. A further suggestion was made that if Indigenous voices are not properly represented in the informal-informals, then it might be better to not have the informal-informals at all.

\* At the end of the meeting, interested members were encouraged to convene a small working group to discuss possible new/revised regulatory text, building on the textual proposals from Spain's two non-papers, The Ocean Foundation, and representatives of Indigenous Peoples and local communities from the Pacific. The small working group will inform the broader intersessional working group of their progress sometime during the week of 4 March 2024, with the view to convening another virtual meeting of the intersessional working group during the week of 11 March 2024. During that next virtual meeting, if held, the intersessional working group will discuss any new/revised textual proposals from the small working group as well as further discuss the proposed modalities and scope of the scheduled informal-informals on UCH.