

Briefing Note for Thematic Discussion on “Underwater Cultural Heritage”

Prepared by the Delegation of the Federated States of Micronesia

The purpose of this note is to provide brief background and guiding questions for the thematic discussion on “Underwater Cultural Heritage” that will take place on 19 July 2024, during the second part of the 29th Session of the Council of the International Seabed Authority.

For the thematic discussion, delegations are invited to focus on DR 35, particularly its material scope (e.g., human remains, objects, and/or sites of an archaeological or historical nature, [tangible and/or intangible] underwater cultural heritage) and the process(es) that must be followed by a Contractor and the ISA upon encounters with the elements covered by the scope of DR 35; as well as on intangible elements of underwater cultural heritage, including possible preventative measures, incorporation in environmental impact assessments and other environmental documents/outcomes, interactions with stakeholder consultations, and rights and principles/approaches governing/guiding the engagements of Contractors and the ISA with such intangible underwater cultural heritage. Delegations are further invited to consult the non-papers on the ISA website pertaining to the intersessional work on underwater cultural heritage, particularly the most recent non-papers from select representatives of Indigenous Peoples and of local communities from the Pacific, as well as from Spain.

To help guide the thematic discussion, and taking into account the above-referenced non-papers, the conversations during the intersessional period, and comments from delegations in the Council on DR 35 in the week preceding the thematic discussion, delegations are additionally invited to address the following questions during the thematic discussion:

- 1) Is the material scope of the current DR 35 sufficient, and are the procedural steps identified in the current DR 35 sufficient to deal with whatever that material scope might be?
- 2) How should the issue of intangible underwater cultural heritage be addressed in the exploitation regulations and other aspects of the Mining Code, especially beyond DR 35, including with respect to “pure” intangible underwater cultural heritage?

Finally, delegations are encouraged to consider possible next steps with respect to the issue of underwater cultural heritage after the second part of the 29th Session of the Council, including whether it might be useful for the facilitator/rapporteur/etc. of the intersessional working group on underwater cultural heritage to put together a set of draft textual proposals, drawing on all inputs submitted and comments made by delegations on the matter (which could include inputs/comments transmitted after the conclusion of the second part of the 29th Session of the Council) and presenting a possible comprehensive approach to the matter, for the consideration of the intersessional working group and/or the broader Council/Authority at a future date.

For a report on the work of the intersessional working group on underwater cultural heritage between the first and second parts of the 29th Session of the Council of the International Seabed Authority, as prepared by the facilitator/rapporteur/etc. of the intersessional working group, please see below:

20 June 2024

On 20 June 2024 (EDT / New York time), the ISA Council's Intersessional Working Group ("IWG") on Underwater Cultural Heritage ("UCH") held its 10th meeting in virtual form. During the meeting, the IWG considered two sets of textual proposals: one on intangible UCH from select representatives of Indigenous Peoples and of local communities from the Pacific, and one on tangible UCH contained in the third non-paper from Spain. Both sets of textual proposals were circulated in written form to the UCH in advance of the meeting.

On the textual proposals on intangible UCH, support was expressed in general terms for the proposals, with references made to, among other things, the recognition of Indigenous Peoples of intangible types of UCH in the Area and surrounding marine environment; the need to honor the right to free, prior, and informed consent affecting or otherwise associated with such UCH; and the upholding of intergenerational equity, in connection with the management of the marine environment for the sake of present and future generations. A note of appreciation was expressed for a proposal for the creation of a new committee on intangible UCH. A suggestion was also made that the proposals on intangible UCH could be merged with the Spanish proposals on tangible UCH, to the extent appropriate.

On the textual proposals on tangible UCH, the representative of Spain presented their third non-paper. Noting that Spain held informal conversations with a number of interested delegations on its third non-paper, the Spanish representative presented the non-paper in their sole national capacity to the IWG. The representative noted that their third non-paper focuses on tangible UCH, in the form of "human remains and/or cultural heritage," with "cultural heritage" defined as in the first non-paper from Spain, and including those tangible UCH associated with intangible elements. Spain proposes a new system of notification of encounters with tangible UCH and follow-up consideration for DR 35, which is a streamlined form of the system they previously proposed, and which involves, among other things, an initial notification from a Contractor to the ISA SG, followed by notification by the SG to all stakeholders (particularly ISA Members, especially those with recognized preferential rights under article 149 of UNCLOS, the ISA Council President, the UNESCO Director-General, other intergovernmental organizations, and other stakeholders that have asked the ISA to be notified in such cases), and further followed by the ISA Council taking a decision on how to deal with the encountered tangible UCH within a particular period of time. With respect to intangible UCH, the representative of Spain stressed that their third non-paper does not directly address this in a regulatory fashion, other than to express the view that it might be more appropriate to take a preventative approach to protecting such intangible UCH, using any number of existing international instruments (including the BBNJ Agreement, as well as existing area-based management tools adopted by the ISA) to establish protective measures for any such intangible UCH in the Area and surrounding marine environment before any decision is taken by the ISA to permit any exploitation of the Area.

Participants in the IWG highlighted the need to have a holistic discussion of UCH, rather than focusing on just tangible or just intangible elements. Appreciation was expressed for Spain's work on its third non-paper, along with encouragement that consideration of tangible UCH

should not de-emphasize consideration of intangible UCH, particularly "pure" intangible UCH (i.e., intangible UCH not directly tied to any tangible UCH).

On the way forward, IWG members agreed that the IWG facilitator will ask the ISA Secretariat and Council President if it will be possible for the ISA Council to have a holistic discussion of UCH matters -- both tangible and intangible elements -- when the Council resumes later this month. IWG members were open to the Council engaging in this holistic discussion during the Council's consideration of DR 35, but it was also noted that DR 35 focuses on tangible UCH, and there is a risk that limiting the UCH discussion to DR 35 will shortchange the full consideration of intangible UCH that a number of IWG members want the Council to have. The IWG facilitator was tasked to express all of the above to the ISA Secretariat and Council President, with a view to scheduling an appropriate time for the preferred holistic discussion to take place at the ISA Council.

As for the textual proposals on tangible and intangible UCH discussed by the IWG in this meeting, the textual proposals on intangible UCH have already been posted on the ISA website, on behalf of the proponents of those proposals, while Spain announced that they will work some more on their third non-paper and likely submit it to the ISA in its national capacity.