Non-Paper of Spain on the Informal Meeting of the ISA Council on underwater cultural heritage of 17 July 2025

24 October 2025

Executive Summary

1. The Informal Meeting of the ISA Council on 17 July 2025 examined Spain's proposed Draft Regulation 35 (DR35) concerning underwater cultural heritage (UCH). Discussions focused on three axes: the treatment of intangible heritage of indigenous peoples, the possible establishment of a dedicated UCH Committee, and the procedure and terminology to be adopted in DR35.

2. Delegations generally agreed that intangible heritage of indigenous peoples should be protected, but through pre-exploitation processes such as environmental and archaeological impact assessments, licensing, regional environmental planning, and marine protected areas. DR35, however, should remain confined to tangible UCH.

3. On the proposal to create a new ISA Committee on UCH, most intervening delegations—such as France, Japan, Spain, Russia, China, Singapore, Argentina, and India—expressed reluctance or opposition. Germany supported the initiative, while the Philippines adopted a reserved position. Nonetheless, no delegation opposed the use of external experts by the Legal and Technical Commission (LTC).

4. A central debate revolved around the relationship between UNCLOS and the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage (CUCH). Spain argued that CUCH should be read as a complementary treaty expressly preserved by UNCLOS articles 303(4) and 311(5). In this view, CUCH functions as an "external rule" under the Vienna Convention on the Law of Treaties and ITLOS jurisprudence, ensuring systemic integration with UNCLOS.

5. Spain maintained that CUCH constitutes the natural legal extension of UNCLOS provisions on UCH, reflecting progressive development of the law of the sea. Even non-parties such as the United States, United Kingdom, or Russia have at times acknowledged CUCH principles, either through bilateral agreements (e.g., Titanic Agreement 2003) or domestic policy instruments.

6. Considerable attention was devoted to the terminology of UCH, as opposed to "objects of an archaeological and historical nature" under UNCLOS. Spain defended the CUCH-inspired definition as operationally precise, widely used in international practice, and aligned with heritage management standards. Although some States remained reluctant, Spain emphasized that the definition would be strictly for regulatory purposes and would avoid legal indeterminacy.

7. Further technical issues addressed included: the concept of "competent observers" (linking it to ISA rules and comparable frameworks in treaties such as OSPAR or BBNJ); the legal protection of sunken State vessels and aircraft (Spain preferring the broader CUCH terminology over the UK's "sovereign immune wrecks"); and the limited obligations of contractors, restricted to prompt notification and cessation of activities within a buffer zone, without imposing archaeological responsibilities.

8. On procedural safeguards, concerns were raised about the impracticability of a fixed 90-day deadline for Council decisions, given its annual schedule. Spain proposed a flexible mechanism whereby the Council would decide at its next session, informed by expert advice from UNESCO/ICOMOS, ensuring both legal certainty and substantive protection.

9. Finally, Spain's revised draft of DR35 sets out a framework for the notification, consultation, and protection of human remains and UCH in the Area, reinforcing the Council's capacity to recommend protective measures, preserving flag State rights over sunken vessels, and excluding compensation claims by contractors. The text consolidates legal certainty by harmonizing UNCLOS obligations with best practices developed under CUCH.

Introduction

1. During the Informal Meeting of the Council held on 17 July 2025 (**Informal Meeting**), where some elements of the Intersessional Working Group (**GW**) on underwater cultural heritage (**UCH**) were discussed, several questions and concerns were raised by some delegations regarding the text proposed by the Kingdom of Spain (**Spain**) for the Drafting Regulation 35 of the Regulation on Exploitation (**DR35**). It is to be reminded that, after two years of discussions in the WG — unfortunately without a sound presence of State's delegations—, it was decided to retain Spain's latest proposal for DR35 of June 2025 as the basis for the WG's discussions, given the general support expressed in the most recent meetings of the IWG.
2. After a general introduction by Micronesia —as main co-facilitator— and Spain —invited to introduce its proposed text of DR35—, during the Informal Meeting the following delegations took the floor (in order of intervention): Italy, France, United Kingdom, Greece, Japan, Germany, Spain, Russian Federation, China, Singapore, Argentina, India, Philippines, and Brazil (as co-facilitator). The President of the Enterprise also took the floor, as well as a representative of the indigenous peoples. The Authority's Secretary-General attended the meeting.
3. Main discussions were about the place to be given to the intangible heritage of indigenous peoples associated with oceans, the need to establish a new body on UCH, and the details of proposed DR35, including its term of art (UCH), procedure for notification, decision-making process and stakeholders involved.
4. Concerning the two first questions, a common ground of agreement was reached:
   (a) Regarding the question of the "intangible underwater cultural heritage", delegations generally agreed on the need to have into serious account the voices of indigenous peoples regarding the preservation and respect of their intangible heritage linked with oceans and probably negatively affected by deep-sea mining; but also agreed that the place to provide for such preservation should be in the initial phases of exploration and exploitation processes (including the licensing process for exploitation activities) and other measures such as the environmental and archaeological impact assessments, the development and management of regional environmental plans and the creation of marine protected areas. It was generally agreed that DR35 should deal only with tangible UCH.
   (b) Regarding the creation of a new "Committee on underwater cultural heritage" to assist the Council and/or its Legal and Technical Commission (**LTC**), most if not all Delegations intervening in the Informal Meeting express their reluctance, if not clear opposition, to the creation of that new body within the Authority. This was the case of France, Japan, Spain, Russia, China, Singapore, Argentina, or India (in order of intervention). Germany was in favour of its creation whilst the Philippines remained hesitant. No opposition was heralded against the use of external experts on UCH by the LTC when necessary.
5. Concerning the third question —the procedure and terminology used in DR35—, part of the discussion evolved around the relevance of the 2001 UNESCO Convention on the protection of the underwater cultural heritage (**CUCH**) in the proposed regulation, which will be discussed next.

Relevance of the 2001 UNESCO Convention

6. Some delegations expressed concerns regarding, in general, the implied reference in DR35 to the CUCH and, in particular, to the use of "underwater cultural heritage" as term of art in that proposed regulation. Main arguments supporting their concerns include the non-universal character of the CUCH and the terminology used in the 1982 UN Convention on the Law of the Sea (**UNCLOS** or

the **Convention**) and in previous ISA regulations. It is therefore a question of compatible interpretation of two successive treaties relating to the same subject matter, a question addressed by article 30 of the 1969 Vienna Convention on the Law of Treaties (**VCLT**) as codified law and clarified by international jurisprudence.

7. This Non-Paper does not purport to engage with complex theoretical questions of international law; nonetheless, it is appropriate to recall certain general principles relating to the interpretation and application of treaties.

8. No international instrument can be read in a vacuum.[1] It is a general rule of treaty interpretation that a convention shall be interpreted taking into account "any relevant rules of international law applicable in the relations between the parties" (article 31(3)(c) VCLT). Among the 170 State parties to UNCLOS, 78 are also Parties to the CUCH, which already have 81 States parties.[2] Numbers, however, are not necessarily pertinent regarding the "relevance" of a treaty: nobody would deny the significance of the 1959 Antarctic Treaty when discussing the legal regime south 60º South notwithstanding having only 58 States parties.[3]

9. It is true that some naval powers and other interested States (e.g. Brazil, Chile, China, Colombia, India, Indonesia, Norway, Philippines, Russia, the UK, or the US) have not ratified CUCH. Certainly, some of them have clearly stated they shall not. But all of them, at the time of adoption the CUCH did not express a sharp opposition to the purpose and main principles of its text. Some of them voted in favour of the adoption of the CUCH (China, India, Indonesia, Philippines). None of them, except the UK (concerned about what it labelled a "blanket protection" definition), were troubled about the concept of UCH embodied in the CUCH.[4]

10. The relationship between UNCLOS and the CUCH is governed by different provisos in both texts: in UNCLOS, article 303(4) states that "[t]his article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature"; and article 311(5) UNCLOS states that the relative prevalence of UNCLOS "does not affect international agreements expressly permitted or preserved by other articles of this Convention." Spain considers that the CUCH is one of these international agreements expressly permitted or preserved by UNCLOS.

11. On its part, article 3 CUCH establishes that "[n]othing in this Convention shall prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the Law of the Sea. This Convention shall be interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea". CUCH deliberately nests itself into international general law and UNCLOS.

12. Some States, however, still have concerns on whether CUCH goes beyond UNCLOS; and it could be in some particular though dubious points (e.g. on article 10(4) on powers of the coordinating States) upon which some States remain concerned, while others provisos clearly going beyond UNCLOS (e.g article 8 on the contiguous zone) have been widely accepted by non-State parties and by the International Court of Justice (**ICJ**) as well (see the case decided in 2022 between Nicaragua and Colombia).[5] On all these questions, it could be reminded that CUCH in its Preamble advances that, when adopting the convention, negotiating States realised "the need to codify and progressively develop rules relating to the protection and preservation of underwater cultural

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[1] Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, para. 76.

[2] Cambodia, Iran and Libya, parties to the 2001 UNESCO Convention, are not parties to UNCLOS.

[3] Indeed, its possible characterisation as an objective regime in international law is still disputed.

[4] See further discussion on UCH as term of art below, at paragraphs 25–34 of this Non-Paper.

[5] Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Judgment, ICJ Reports 2022, paras. 185–186.

heritage in conformity with international law and practice", including several widely ratified UNESCO conventions but UNCLOS as well. Exactly what the later did in 1982, recognising in its Preamble the "codification and progressive development of the law of the sea achieved in this Convention."

13. In this sense Spain considers with many States that CUCH is the natural legal prolongation of the protection of the underwater cultural heritage, left uncertain by UNCLOS. Logically, CUCH only obliges to its States parties (articles 26 and 34 VCLT). But its intimate relationship with UNCLOS (as well as with other UNESCO conventions) makes it necessary, for the purposes of this Non-Paper, to shed some light on the effects that CUCH has on UNCLOS.

14. It is worth recalling here the insightful reflections made by the International Tribunal for the Law of the Sea (**ITLOS**) regarding the "continuing relevance" of the UNCLOS as a "living instrument" in the protection of the marine environment, as well as its particular relationship with what the Tribunal refers to as "external rules" to the Convention in this field. Thus, in its Advisory Opinion of 21 May 2024 (**ITLOS Advisory Opinion**), issued in response to the request submitted by the Commission of Small Island States on climate change and international law, the Tribunal noted that:

> "Coordination and harmonization between the Convention and external rules are important to clarify, and to inform the meaning of, the provisions of the Convention and to ensure that the Convention serves as a living instrument. The relationship between the provisions of Part XII of the Convention, entitled 'Protection and Preservation of the Marine Environment', and external rules is of particular relevance in this case."[6]

15. Even more recently, in its advisory opinion on *Climate Change* of 23 July 2025, the ICJ has somehow echoed the approach by ITLOS on how to keep interlinked related treaties and these with customary international law.[7]

16. ITLOS broadly defines "external rules" as "other relevant rules of international law",[8] including "both relevant rules of treaty law and customary law."[9]

17. For ITLOS, UNCLOS contains certain provisions —also called rules of reference (a sort of "choice-of-law rules")— that refer to external rules. One of these rules of reference is to be found in article 237(1) UNCLOS. "The rules of reference —said the Tribunal— contained in Part XII of the Convention and article 237 of the Convention demonstrate the openness of Part XII to other treaty regimes."[10]

18. For ITLOS, "[a]rticle 237 of the Convention reflects the need for consistency and mutual supportiveness between the applicable rules. On the one hand, Part XII of the Convention is *without prejudice* to the specific obligations of States under special conventions and agreements *concluded previously* in this field and to agreements *which may be concluded in furtherance of the general*

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[6] Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal), Advisory Opinion of 21 May 2024, ITLOS Reports 2024, para. 130.

[7] Obligations of States in Respect of Climate Change, Advisory Opinion of 23 July 2025, ICJ Reports 2025.

[8] ITLOS Advisory Opinion, para. 124.

[9] *Ibid*., para. 135.

[10] *Ibid*., para. 134. Article 237 UNCLOS says as follows: "1. The provisions of this Part are without prejudice to the specific obligations assumed by States under special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment and to agreements which may be concluded in furtherance of the general principles set forth in this Convention. 2. Specific obligations assumed by States under special conventions, with respect to the protection and preservation of the marine environment, should be carried out in a manner consistent with the general principles and objectives of this Convention."

principles of the Convention. On the other hand, such specific obligations should be carried out in a manner consistent with the general principles and objectives of the Convention."[11]

19. Spain considers that an analogous approach to that theorised by ITLOS regarding environmental external rules may be followed regarding the protection of the underwater cultural heritage. Significantly, as mentioned, article 303(4) UNCLOS states that "[t]his article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature." A similar rationale may be found in this article than that inspiring article 237 of UNCLOS: both are "without prejudice" clauses that save pervious or forthcoming treaties in the same matter.

20. Practice of reluctant States also clarifies this. When drafting the 2003 *Titanic* Agreement, the principles and, most particularly, the Annex of the CUCH were in mind, and expressly mentioned by US agencies when negotiating such agreement. The latter entered into force in 2019 when ratified by the UK and the US (but not yet by Canada and France, the latter a State party to CUCH). The UK has publicly acknowledged in 2005 the principles of the CUCH and accepted its Annex as best practices. More recently, when submitting in April 2024 its new Management Plan for the wreck of Shackleton's *Endurance*, lost in the Antarctica in 1915, the UK expressly accepted that "[t] he UNESCO 2001 Convention on the Protection of Underwater Cultural Heritage provides a common framework for states parties to better identify, research and protect their underwater cultural heritage, while ensuring preservation and sustainability" (footnotes omitted).

21. During the negotiations of DR35, Spain discussed its text with some other like-minded States: Australia, Greece and Norway (and the UK later, on a bilateral basis). None of them rejected the use of CUCH as inspiring text and a basis for delineation of both the term of art proposed and the notification and cooperation process embodied in the DR, akin to those included in CUCH

22. Spain considers that CUCH is a relevant rule of UNCLOS, i.e. one of its "external rules" with regard the protection of UCH also in the Area. This interpretative approach —particularly grounded in general international law of treaties and of the law of the sea— permits systemic integration of applicable rules of international law. In this context, the CUCH, although not universally ratified, may qualify as an UNCLOS' "external rule" where its provisions reflect the relevance and acceptation, or are otherwise pertinent to the interpretation and application of articles 149 and 303 UNCLOS.

23. This clarifies the use of UCH instead of "objects of an archaeological and historical nature" in DR35, as well as provides a sound legal base to accommodate article 149 UNCLOS in the system of notification and protection of UCH for the Area proposed in DR35 by Spain (and arguably supported by Greece and Singapore, States not parties to CUCH). During the Informal Meeting, Italy suggested to have in mind the notion of "verifiable link" —a concept closely linked to the term UCH in the CUCH[12]— to identify those States mentioned in article 149 UNCLOS that could participate in the system proposed in DR35. For the sake of record (as a preparatory work to be used when interpreting DR35 in the future), in its Non-Paper of 18 February 2024, Spain expressly mentioned at para. 15 the notion of "verifiable link" for States declaring their interest to participate in the cooperation system proposed in DR35.[13]

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[11] *ITLOS Advisory Opinion*, para. 133, emphasis added.

[12] In 2015, the States Parties to the Convention adopted its Operative Guidelines under which the interest is to be demonstrated by (a) the results of scientific expertise, (b) historical documentation, or (c) any other adequate documentation (Doc. UNESCO CLT/HER/CHP/OG 1/REV, August 2015, at 9).

[13] All Spain's previous non-papers are available at the Authority website.

Refining the text of DR35

24. Having in mind previous discussion and the comments, concerns and proposals voiced during the Informal Meeting, some improvements could be incorporated in DR35. Main questions are the used of UCH as term of art, raised by the UK, Russia and China; the notion of "competent observers" raised by Greece and Argentina (the latter also wondering about the term stakeholders); the reference to sunken State vessels; the responsibilities of contractors finding UCH in their contract areas; and some procedural questions (as raised by Germany and Italy).

UCH as term of art in the Regulations

25. Regarding the term of art used in DR35 (UCH), it was suggested by the WG to include a definition of UCH early proposed by Spain. This definition says as follows: " 'Underwater cultural heritage' refers to all traces of human existence found in the Area which have been underwater for at least 100 years, having a cultural, historical or archaeological character, or are associated with intangible cultural heritage, such as objects of prehistoric character, human remains, sites, structures, buildings, artifacts, vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context."[14]

26. Should this definition does not contradict or unacceptably extend the meaning of UNCLOS terminology in articles 149 and 303 ("archaeological and historical objects") is a matter of discussion. Arguably, UNCLOS does not refer to underwater cultural heritage but to "objects of an archaeological and historical nature", without defining them.[15] But nothing impedes to find both terms of art, if not synonymous, having a very similar meaning. UNCLOS preparatory works help to arrive to this conclusion, as well as CUCH preparatory works show that negotiating States at Paris, when addressing UCH, were referring to the "objects of an archaeological and historical nature" mentioned in UNCLOS.

27. Significantly, the already adopted Regulations on prospecting and exploring have not followed UNCLOS terminology *expressis verbis* either: whilst their common Art. 8 —applicable to prospectors— refers to any "object of actual or potential archaeological or historical nature", regulations 35 (Nodules) and 37 (Sulphides and Crusts) —applicable to contractors— refer to "any human remains of an archaeological or historical nature, or any object or site of a similar nature".

28. As explained in Spain's non-paper of 11 December 2023, the proposed definition of UCH was inspired in article 1(1) of the CUCH which, in turn, was inspired by the 'Charter on the Protection and Management of the Underwater Cultural Heritage' (**Charter of Sofia)**, adopted in 1996 by the International Council on Monuments and Sites (**ICOMOS**),[16] the most important NGO associated with UNESCO in cultural matters. It also considered (i) that UCH is today the term generally used not only by UNESCO but in most document and texts dealing with underwater archaeology, (ii) it is widely accepted by the international scientific community, and (iii) includes a reference not only to the archaeological context but to the natural context as well. The latter is a relevant aspect which dominates all mining regulations of the Authority.

[14] It should be noted that, although the proposed DR35 expressly and separatedly includes "human remains," the very definition of UCH cited above likewise encompasses such remains, insofar as, having been submerged for more than 100 years, they would already qualify as part of the UCH. Nonetheless, this should not result in the absence of protection for more recent human remains, which equally merit being shielded from disturbance by mining activities. Accordingly, they are also identified as a distinct object of protection, separate, where appropriate, from the UCH as done in DR35.

[15] UNCLOS mentions the term "ship" 109 times and "vessel" 89 times, without defining them either.

[16] Available at <https://www.icomos.org/images/DOCUMENTS/Charters/underwater_e.pdf>.

29. If the Council of Europe (**CoE**) open the path, using the term UCH in 1978 for the first time in official international documents,[17] later influencing ICOMOS and UNESCO texts, the UN General Assembly has consistently used the term UCH in its resolutions of "Oceans and the Law of the Sea" during the last two decades.[18] The term is also thoroughly used at the European Union, mostly after the adoption of Directive 2014/89/EU on Maritime Spatial Planning.[19] In the African Union (**AU**), in October 2018 was adopted the AU Model Law on the Protection of Cultural Property and Heritage (2018), whose article 21 is explicitly titled: "Underwater Cultural Property and Heritage".[20]

30. Also significantly, in the already cited case between Nicaragua and Colombia decided by the ICJ in 2022, the Court used UCH as follows: "Following the conclusion of UNCLOS, a growing number of States have extended the application of their cultural heritage legislation over the contiguous zone, and multilateral treaties have been concluded to protect *underwater cultural heritage*."[21] The ICJ, having determined that UNCLOS was inapplicable between the parties to the dispute on the basis that Colombia was not a State party to the Convention, nonetheless refrained from employing the terminology set forth in Articles 149 and 303, opting instead to apply the broader concept of "underwater cultural heritage" (UCH).

31. Some States still reluctant to the use of the term UCH have already use it officially in different moments. In the case of the UK, in its sound involvement in the Antarctic system, has used UCH not only in the already mentioned management plan of the *Endurance* wreck but also in its policy paper "British Antarctic Territory: conserving and protecting Underwater Cultural Heritage" (17 Dec 2018); and was the generic title used when discussed the possible ratification of CUCH in the UK Parliament. In the case of Norway, the "Report No. 37 to the Storting (2008–2009), Integrated Management of the Marine Environment of the Norwegian Sea" defines and discusses the concept in its Chapter 3.4 on the "The underwater cultural heritage". In the case of Russia's official Black Sea policy, its document "Common Maritime Agenda for the Black Sea – Goal I: Healthy marine and coastal ecosystems" calls to "[p]romote further exploring underwater cultural heritage itineraries […]". China uses the term "underwater cultural relics" in its 2022 version of its Regulation on the Protection and Management of Underwater Cultural Relics. And in the US, the term UCH appears explicitly in official materials including the ACUA's legislative overview, NOAA/BOEM UCH Case Law Study, policy analyses, and NPS videos regarding the UNESCO Convention.

32. States that are not Parties to the CUCH have likewise made extensive use of the term "underwater cultural heritage" within their respective national legal frameworks. By way of example, Colombia employs the equivalent expression *patrimonio cultural sumergido* in its 2013 Law; constituent Emirates of the United Arab Emirates have incorporated the term in their domestic legislation, notably in the 2016 Law of Abu Dhabi and the 2020 cultural legislation of Sharjah; the Netherlands refers to UCH in its 2016 Heritage Act; Papua New Guinea makes use of the term in its 2015 maritime legislation; and Kenya similarly adopts it in its 2016 Act, as well as Australia in its 2018 Act.

33. To sum up, the terminology "underwater cultural heritage," as employed in CUCH, constitutes a conceptually broader and more operationally precise designation than the expression "objects of an archaeological and historical nature" found in articles 149 and 303 UNCLOS. Whereas the latter

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[17] See CoE Recommendation 848 (1978), 4 October 1978, on the Underwater Cultural Heritage.

[18] See its last example at A/RES/79/144, 16 December 2024, on Oceans and the Law of the Sea, paras. 8–9. UNGA begun to use this term in its resolution A/RES/60/30, 12 September 2005, on Oceans and the Law of the Sea, paras. 7–8.

[19] OJ L 257, 2014.

[20] Adopted by the AU Specialized Technical Committee on Youth, Culture and Sport (STC-YCS3), October 2018.

[21] *Alleged violations…, ICJ Reports 2022*, para. 185, emphasis added.

formulation is restrictive, both temporally and substantively, and susceptible to divergent interpretations as to the threshold of archaeological or historical significance, the term "underwater cultural heritage" is defined in article 1(1) CUCH with reference to a clear temporal criterion (objects at least 100 years old) and to a comprehensive typology encompassing sites, structures, vessels, aircraft, and other traces of human existence of cultural, historical, or archaeological character. This terminological shift reduces interpretative ambiguity, accommodates interdisciplinary heritage management practices, and ensures the inclusion of cultural resources and natural context whose significance transcends purely archaeological or historical attributes, thereby aligning the regime with contemporary heritage protection standards and facilitating uniform application by States and other stakeholders.

34. In any case, the definition proposed by Spain is *only for the purposes of these Regulations* and does not try to significantly alter the terms used, but not defined, in UNCLOS. Indeed, it aims to avoid constructive ambiguities and suggests a workable notion, thus avoiding the use of legally indeterminate concepts.

The concept of "competent observers"

35. Observers to ISA are typically drawn from three main categories: (i) States not party to UNCLOS but invited to attend; (ii) International and intergovernmental organizations, including UN agencies (**IOs**); and (iii) Non-Governmental Organizations (**NGOs**) with relevant interests.

36. The term "competent observers" is not formally defined in the legal instruments governing the Authority, but the concept is functionally embedded in ISA's rules and procedures for admitting and managing observer participation. Article 169(1) UNCLOS refers to "consultation and cooperation with international and non-governmental organizations recognized by the Economic and Social Council of the United Nations"; and paragraph 3 of same article refers to "non-governmental organizations referred to in paragraph 1 on subjects in which they have special competence and which are related to the work of the Authority." In no case, UNCLOS defines the criteria ECOSOC follows to "recognise" such IOs and NGOs nor what would be the "special competence" related to the work of the Authority. But these IOs and NGOs are actually interplaying with the Authority.

37. Legal basis for these observers' participation is manyfold:

- article 156(3) UNCLOS, that grant observer rights to entities from the Third UN Conference on the Law of the Sea, subject to ISA's internal procedures, and article 169, as mentioned;
- rule 82 of the ISA Assembly Rules of Procedure, which allows the Assembly to admit observers that must have a "legitimate interest" in the work of the Authority, thus implying relevance and expertise;
- ISBA/25/A/7 – Annex II (Guidelines for Observer Status for NGOs), a document that specifies eligibility criteria that indirectly require competence such as NGOs must show relevance to ISA's mission (e.g. marine science, environment, law), applications must include evidence of expertise or capacity-building potential, participation history and alignment with ISA values are considered; and/or the fact that observer status may be revoked for inactivity or loss of relevance;
- Regulations on Exploration and Prospection continuously refer, but without defining them, to "competent international organizations"; and
- Rule 15 of LTC Rules of Procedure, on "Consultations", says that "[i]n the exercise of its functions, the Commission may, where appropriate, consult another commission, any

competent organ of the United Nations or of its specialized agencies or any international organizations *with competence in the subject-matter* of such consultation" (emphasis added).

38. Agreements on ocean governance also refer to competent observers. Hence, among others, article XXIV of the 1980 Convention on the Conservation of Antarctic Marine Living Resources (CAMLR Convention), article 11 of the 1992 Convention on the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), or article 48 of the 2023 Agreement under UNCLOS on Marine Biodiversity beyond National Jurisdiction (BBNJ Convention) foreseen the participation of observers whose competence is evaluated. The same could be said, for example, in relation to the Integrated Fisheries Monitoring Protocols under FAO/IMO frameworks.

39. Spain considers that while the phrase "competent observers" is not found verbatim in these texts, that is not defined either or refers to different stakeholders, the provisions developed establish frameworks where observer legitimacy, relevance, and procedural clarity mirror what one would expect under a concept of "competent observers." These include eligibility criteria, accreditation processes, categorization of observer types, and transparency in access.

The reference to sunken State vessels and aircraft

40. Paragraph 6 of proposed DR35 refers to sunken State vessels. Its wording is as follows: "No member State shall undertake or authorize activities directed at, or incidentally affecting, sunken State vessels and aircraft without the consent of the flag State." This paragraph inspires in article 12(7) CUCH whose text is: "No State Party shall undertake or authorize activities directed at State vessels and aircraft in the Area without the consent of the flag State."

41. Spain considers that both CUCH and DR35 endorses the general principle of international law upon which, unless explicitly abandoned, sunken State vessels and aircraft remain the public property of the flag State and, consequently, no activity directed or incidentally affecting these sunken vessels or aircraft can be performed without the previous authorisation of the flag State.

42. However, the UK —based in statutory approach—proposes a different formulation of the principle in DR35, using the concept of "sovereign immune wrecks and aircraft". Spain does not agree and prefers the term "sunken State vessels and aircraft" for several reasons:

    – Terminological precision: "sunken State vessels and aircraft" are generally used regarding the protection of UCH, as mentioned in CUCH;[22]

    – Link with activity: by stating "directed at, or incidentally affecting", ensures a proportional and objective threshold for requiring consent, consistent with the duty of due regard in UNCLOS (Articles 87 and 92) and avoids overbreadth; and

    – Legal complexity of determining sovereign immunity post-sinking: the British proposal requires a prior legal determination that a wreck retains sovereign immunity. This is problematic because establishing sovereign immunity after sinking is not automatic. It involves a complex, case-by-case analysis under international law, while using the term "sunken State vessels and aircrafts" establishes a general limit that precludes, *prima facie*, any activity not authorised by the flag State.

43. Spain considers that current DR35 formulation ensures proactive protection of sunken State vessels under internationally accepted principles, without entangling the issue in legal ambiguity over whether a wreck qualifies as "sovereign immune." This approach better serves the flag State's rights (as preserved by current international law), promotes legal certainty (using an objective

[22] UNCLOS refers to "warships and other government ships operated for non-commercial purposes", for example in article 32

term), and avoids the risk of unauthorized disturbance during protracted legal analysis (not affecting other rights of any stakeholder).

44. The objective characterisation of the term "sunken State vessel or aircraft" may be however subject to challenge at the stage of ascertaining whether the remains in question indeed pertain to such a vessel or aircraft. The evidentiary burden to establish this characterization rests with the flag State. While in certain instances this burden may be substantial, it is to be presumed that it is the flag State itself that seeks to assert and preserve its rights over the submerged remains of its public property located in areas beyond the jurisdiction of any other State. Consequently, as the entity possessing both the most direct knowledge of, and the paramount interest in, safeguarding its public property lying on the seabed, the flag State must bear the responsibility for discharging that burden of proof.

45. It may also be noted that the term "sunken State ships" has been employed in authoritative doctrine. In its Resolution on 'The Legal Regime of Wrecks of Warships and Other State-owned Ships in International Law', the *Institut de droit international* (IDI) adopts an analogous term of art, opting for the term "ship" rather than "vessel" but with identical meaning.[23]

The responsibilities of contractors finding UCH in their contract areas

46. During the Informal Meeting, Russia and China emphasized the need to avoid imposing any additional burden upon the contractor with respect to the protection of human remains and UCH discovered within its contract area. Spain concurs with this position: the contractor should not be charged with archaeological responsibilities, as it is not technically equipped to undertake activities beyond the intact preservation of any objects found and their buffer zone. In practical terms, this corresponds to the obligation set forth in paragraph 2 of DR35, namely, to promptly notify the discovery and to suspend all activities within a 300-meter buffer zone surrounding the site. The contractor's obligation to report "the preservation and protection measures taken" must therefore be understood as referring solely to immediate, non-intrusive actions necessary to maintain the integrity of the find and its buffer zone until competent authorities intervene.

47. This absence of substantive archaeological obligations is complemented by the principle, reflected in paragraph 8 of DR35, that the contractor shall not be entitled to compensation for any measures required for the effective discharge of its limited duties in this regard. The rationale underpinning this principle is that the contractor is expected to have exercised due diligence to detect the presence of any remains or objects during the exploration phase or in the course of preparing its application for a Plan of Work. Accordingly, it cannot claim compensation for measures that are a foreseeable and inherent aspect of responsible operations.

Procedural questions

48. During the Informal Meeting, Germany raised a pertinent procedural concern regarding the proposed period of ninety (90) days within which the Council would be required to decide whether to terminate exploitation activities in an area surrounding discovered human remains or UCH. Given that the Council convenes only once per year, such a period is impracticable. Delegating this decision to the LTC is not legally feasible and does not solve the problem since the LTC meets twice per year (normally in February and before the Council annual meeting in July). Moreover, allowing the decision to remain pending for an indeterminate period —potentially extending from the proposed ninety (90) days to nearly an entire year, in cases where the Secretary-General's

[23] Adopted at IDI Tallin Session of 2015. Available, with discussions, at <https://www.idi-iil.org/app/uploads/2017/06/02-Ronzitti-epave.pdf>.

notification of the discovery occurs immediately after the conclusion of a Council session— is procedurally unsound and substantively unacceptable.

49. Conceivably, the establishment within the Authority of a dedicated UCH Committee, to which the Council could delegate its decision-making authority in such matters, subject to subsequent review at the Council's next session, could provide a functional alternative. However, such a mechanism is neither contemplated in the Convention nor in the internal rules and procedures of the Authority. In addition, most delegations were against the creation of such a body, as explained above in paragraph 4(b).

50. It should be recalled that the competence of the Authority, including that of its organs, does not extend to the protection of UCH in the Area. The "archaeological and historical objects" referred to in Article 149 UNCLOS were, at an early stage, excluded from the notion of the "resources" of the Area.[24] Consequently, activities directed at UCH in the Area do not fall within the scope of "activities in the Area" as defined in Article 1(3) UNCLOS. While certain limited competences of the Authority over UCH in the Area were initially contemplated,[25] such a possibility was removed as of 1976,[26] and the final text of current article 149 remained unaltered, save for minor stylistic refinements.

51. Accordingly, proposed DR 35 merely acknowledges the possibility for the Council to recommend to Member States the adoption of measures aimed at preserving human remains or UCH in their archaeological and natural context, for the benefit of humankind as a whole. By contrast, where the Council does possess authority—namely, in regulating exploitation in the Area—its decisions, including urgent measures adopted pursuant to Article 162(2)(w) UNCLOS, are binding upon all stakeholders engaged in such exploitation. Nonetheless, the issue of "time" persists, whether in the context of ordinary or urgent measures. The case *Greenpeace/NORI* illustrates the limits of the Council's decision-making powers.

52. A potential remedy for this deadlock would be to refrain from establishing a fixed time limit for the Council to recommend any measure, other than requiring consideration at its next immediate meeting. This approach rests on the following considerations:

    – The decision at issue concerns the contractor's rights within its contract area, which, under the Convention, may only be taken by the Council, and which would affect only a limited portion of such area (i.e., the site in question plus a buffer zone with a 500-meter radius);[27]

    – The contractor should be required to immediately suspend any activity within that limited area, while being allowed to continue its exploitation activities in the remainder of the contract area;

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[24] As the International Law Commission affirmed in 1956 (referred to the continental shelf but perfectly applicable *a fortiori* to the Area), "[i]t is clearly understood that the rights of the coastal State do not cover objects such as wrecked ships and their cargoes (including bullion) lying in the seabed or covered by sand in the subsoil." *Ybk. Int. L. Commission*, vol. II, 1956, at 298. Under Article 133 LOSC, 'resources' means 'all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules.'

[25] See article 19 of the Informal Single Negotiating Text (ISNT) at UN Doc. A/CONF.62/WP.8/Part I.

[26] See article 19 of the Revised Single Negotiating Text (RSNT) at UN Doc. A/CONF.62/WP.8/Rev. 1/Part I.

[27] Instead of a complex equation with depth, ocean currents and other contextual variables, it is considered preferable to propose a blanket distance. As examples, the archaeological site of the RMS *Titanic*—so far, the biggest underwater archaeological site generated by a wreck in the Area—expands 3 by 5 nautical miles at 3,800 mts depth, that is 51,5 square kilometres approximately. For comparison, the entitled exploration area allocated to each contractor is 75,000 square kilometres for polymetallic nodules, 10,000 square kilometres for polymetallic sulphides (with 100 blocks, each no greater than 100 square kilometres), and 3,000 square kilometres for cobalt-rich ferromanganese crusts (with 150 blocks, each block no greater than 20 square kilometres).

Other wrecks at around 3,000 mts depth—like the *Endurance* in Antarctic waters or the HMAS *Sidney* off the coast of Western Australia —have an approximate buffer zone of 500 mts radius.

- The Secretary-General, upon transmitting the finding to the Council (therefore, including the LTC and, if so decided, to the group of experts established within the LTC), as well as to the Director-General of UNESCO and to other competent organizations and observers, could then receive a report prepared by the LTC experts, to be submitted to the Council at its next meeting;
- Spain proposes that this group of experts be composed of qualified specialists in underwater cultural heritage, to be designated by the Director-General of UNESCO, preferably from among the members of the International Committee on Underwater Cultural Heritage (ICUCH) of the International Council on Monuments and Sites (ICOMOS);
- Pursuant to Article 169(1) UNCLOS, and with the Council's approval, the Secretary-General could conclude appropriate arrangements for such consultation and cooperation with UNESCO and ICUCH-ICOMOS;
- Under Article 169(3) UNCLOS, the Secretary-General would circulate to States Parties the written reports prepared by the group of experts, bearing in mind that only States—not the Authority—hold the rights and obligations under UNCLOS relating to underwater cultural heritage; and
- Finally, at its subsequent session, and taking into account the views of the group of experts, the UNESCO, and other competent organizations and observers, the Council would adopt a decision regarding the continuation of exploitation activities by the contractor in the affected portion of its contract area.

53. Spain considers that, unless a more refined procedural alternative is proposed, the foregoing considerations may address and resolve the concerns expressed by certain delegations during the Informal Meeting.

Proposed text for DR35

54. Bearing in mind all these considerations, Spain proposes the following text for DR35:

DR35 – Human remains and underwater cultural heritage

1. Exploitation activities in the Area shall be conducted in a way that does not negatively affect human remains or underwater cultural heritage.
2. The Contractor shall notify the Secretary-General in writing within two (2) days the finding in the Contract Area of any human remains or underwater cultural heritage, and its location, including the preservation and protection measures taken. The Contractor shall immediately cease exploitation activities within a 500 meters radius of the finding.
3. The Secretary-General shall transmit such information in writing, within five (2) days of receiving it to all member States, the President of the Council, the Director General of the United Nations Educational, Scientific and Cultural Organization (UNESCO), to any other competent international organization, and to any other competent observer.
4. Within ten (10) days of the notification of the discovery by the Secretary-General, any member State may declare to the President of the Council its interest in being consulted on how to ensure the effective protection of the human remains or underwater cultural heritage found in the Area. The sponsoring State of the Contractor shall always be considered one of these interested State. Competent organizations and observers shall have the same length of time to notify the Secretary-General their interest in being consulted.

5. After ascertaining the views of member States, particularly those with preferential rights under Article 149 of the Convention, in its next immediate meeting after the notification of the discovery by the Secretary-General, the Council shall make a decision as to whether or not exploitation activities shall be terminated within the area referred to in paragraph 2. The Council may suggest to the Member States any additional measure to preserve the human remains or underwater cultural heritage in their archaeological and natural context, for the benefit of humankind as a whole. In adopting its decisions, the Council shall take into account the views of the United Nations Educational, Scientific and Cultural Organization and other competent organizations. The Council may also take into account the views of other competent observers and shall be assisted by the experts on underwater cultural heritage [nominated][selected][appointed] by the Legal and Technical Commission.
6. No member State shall undertake or authorize activities directed at, or incidentally affecting, sunken State vessels and aircraft without the consent of the flag State.
7. Any measure decided under this regulation shall be adopted or suggested in accordance with applicable standards and taking into consideration adopted guidelines.
8. The Contractor shall not be entitled to compensation for any measure required in this regulation.
9. The Council shall forward to the Seabed Mining Register all information, except for confidential information, used in making its decision under paragraph 5 of this regulation.