

## OWNERSHIP IN THE DEEP SEAS

### INTEGRATING CULTURE, HERITAGE, AND IDENTITY IN DEEP SEABED MINING REGULATION

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Ongoing deep seabed mining negotiations evoke two competing visions of the ocean: as a vast (social) emptiness rich in wealth for the taking; or as a place where deep human connections exist despite arbitrary lines drawn to distribute states' legal authority over it. The first tends to be the prevailing view, and the second is a challenger grounded on culture and identity. In this essay, I wish to unpack the roles of traditional knowledge and cultural heritage in deep seabed mining negotiations. I argue that attention to states' broader international legal obligations requires the deep seabed mining regime to take heritage and identity more seriously than it does at present, and thus to provide better pathways for communities with cultural links to the ocean to be involved in deep seabed mining negotiations. In particular, I show that intangible cultural heritage, a form of cultural heritage largely absent from deep seabed mining negotiations thus far, provides more solid doctrinal and practical ground for the regime's engagement with culture and identity.

#### *Intangible Cultural Heritage, Traditional Knowledge, and Available Identity Levers*

The stakes for deep seabed mining are economic, political, cultural, and ecological. Debates tend to foreground the economic possibilities of seabed mining (particularly of access to minerals), intertwined with the political economy of development, as poorer countries jockey for access to riches. Ecological concerns seem to urge caution and call for choosing nature conservation over money (thereby privileging a different type of wealth). These conversations tend to obfuscate the cultural stakes of deep seabed mining, and its potential to interfere with, and destroy, the worlds and worldviews of Indigenous peoples and local communities. These peoples' and communities' views often align with environmental movements as anti-mining positions, but, as I show below and as we have shown in the introduction to this symposium, they also do other work. Specifically, the cultural stakes of deep seabed mining make room for different epistemologies, and as potential levers to create fairer international legal regimes for those populations likely to be most deeply affected by them.

Traditional knowledge is a label for ways of seeing the world and scientific knowledge produced by Indigenous peoples and local communities. It is closely intertwined with cultural heritage—in fact, arguably traditional knowledge is a subset of one domain of cultural heritage: intangible cultural heritage, defined as the social practices and knowledge forms that communities, groups, and sometimes individuals practice, recreate, transmit across generations, and draw upon for a sense of shared identity.<sup>1</sup> Intangible heritage is not usually associated with the seabed

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<sup>1</sup> [Convention for Safeguarding of the Intangible Cultural Heritage 2003](#), Art. 2(1), adopted 17 October 2003, entered into force April 20, 2006, 2368 UNTS 3 [hereinafter ICHC].

or the law of the sea more broadly, but, as I argue in this section, it should be. This type of heritage allows us to imagine different ways of seeing territory and how we use and relate to the resources around us, and the deep connections between resources and identity that widen the scope of who gets to participate in decision making about these resources.

International law of the sea usually refers to underwater cultural heritage as the key domain. In fact, the UN Convention on the Law of the Sea (UNCLOS) recognizes underwater cultural heritage,<sup>2</sup> including through language that speaks broadly of “laws and practices with respect to cultural exchanges,” which one could interpret as extending to intangible heritage.<sup>3</sup> The 2001 Underwater Cultural Heritage Convention also makes explicit reference to UNCLOS.<sup>4</sup> However, the 2001 Convention refers only to artifacts that have been underwater for over one hundred years,<sup>5</sup> and not to living cultural relationships to the ocean. The latter is the province of the 2003 Intangible Cultural Heritage Convention (ICH Convention), which refers not only to social practices, but also to the physical artifacts and sites associated with them.<sup>6</sup> These sites encompass Pacific and Indigenous relationships to the ocean.

Further, the ICH Convention has been very widely ratified (by 182 parties), in contrast to the Underwater Cultural Heritage Convention (by seventy-six parties). The former instrument is therefore much more influential in shaping our relationship with culture, and in creating international legal obligations for International Seabed Authority member states. Moreover, the influence of the ICH Convention on our relationship with culture more broadly means that one must pay attention to the intangible elements of cultural heritage (the underlying social practices, systems of knowledge, and ways of seeing the world), rather than only to objects themselves.

Perhaps the most central conceptual contribution of intangible cultural heritage and the ICH Convention is to detach culture from territory, supporting plural forms of imagining relationships with culture in areas like the oceans. Intangible cultural heritage, after all, does not depend on a specific site or national territory. It follows a people, wherever it goes. It is tied to identity, in its moving, evolving facets. Even though the ICH Convention requires states to nominate practices for inclusion on international heritage lists, in practice, it reinforces de-territorialization by privileging multinational nominations, many of which span multiple countries that do not share borders. Falconry, a shared tradition among twenty-four states from Ireland to South Korea, Germany to Morocco, comes to mind as an example.

Also relevant are the 2015 Ethical Principles for Safeguarding Intangible Cultural Heritage, adopted by the Intergovernmental Committee that oversees the Convention’s implementation. They state that the access of intangible heritage creators and custodians to the “cultural and natural spaces and places of memory whose existence is necessary for expressing the intangible cultural heritage should be ensured” in all contexts. Further, “[c]ustomary practices governing access to intangible cultural heritage should be fully respected, even where these may limit broader public access.”<sup>7</sup> These provisions extend to all interactions with third parties, including economic actors such as mining companies. In other words, there is an obligation upon all states parties to the ICH Convention to ensure that spaces needed for Indigenous peoples’ and local communities’ intangible heritage be protected, and that these groups have access to those sites, even at the expense of mining operations.

<sup>2</sup> [United Nations Convention on the Law of the Sea](#), Arts. 149, 303, 1833 UNTS 397, 21 ILM 1261 (1982).

<sup>3</sup> *Id.* Art. 303.

<sup>4</sup> [Convention on the Protection of the Underwater Cultural Heritage 2001](#), Art. 3, adopted November 2, 2001, entered into force January 2, 2009, 2562 UNTS 3 [hereinafter UCHC].

<sup>5</sup> *Id.* Art. 1(1)(a).

<sup>6</sup> [ICHC](#), *supra* note 1, Art. 2(1).

<sup>7</sup> [2015 Ethical Principles for Safeguarding Intangible Cultural Heritage](#), Principle 5 [hereinafter Ethical Principles].

Framed in this way, the relevant intangible heritage is forms of mobility, storytelling, and knowledge systems that depend on waters and other maritime resources that may be affected by deep seabed mining (in other words, the current uses of the ocean). Intangible heritage as a concept and as a legal regime adds means to validate and center Indigenous peoples' and local communities' narratives and identities in our configuration and uses of the ocean.

Moreover, the ICH Convention's rules on participation create an additional lever for participation and identity to shape the deep seabed mining regime. Specifically, the ICH Convention requires states "to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management."<sup>8</sup> The Ethical Principles document also states that all interactions with ICH creators and custodians "should be characterized by *transparent* collaboration, dialogue, negotiation and consultation, and contingent upon their *free, prior, sustained and informed consent*."<sup>9</sup>

As a subset of intangible cultural heritage, traditional knowledge also has a fundamental role to play in giving direction to current uses of the ocean and cementing the centrality of Indigenous knowledge to ocean management. The 2023 Agreement on Biodiversity Beyond National Jurisdiction (BBNJ Agreement),<sup>10</sup> with eighty-four signatories at the time of writing, has a large number of provisions specifically on the involvement of Indigenous peoples and their traditional knowledge. The BBNJ Agreement is an important instrument because it creates an opening in the UNCLOS architecture to consider Indigenous knowledge, which can help reshape the meanings of the treaty regime by bringing in multiple epistemologies. Under it, Indigenous peoples become central in shaping knowledge available on marine biodiversity, and to direct modalities of its use. The BBNJ Agreement, in other words, allows Indigenous and other traditional communities to be on par with other forms of expertise in managing the marine environment.

Traditional knowledge in the BBNJ Agreement, therefore, offers important lessons for the deep seabed mining regime. Further, the intangible heritage framework helps to identify these forms of knowledge, lending them further recognition and visibility. The rules on participation that are central to all these concepts and their corresponding regimes are important to breathe life into the International Seabed Authority's (ISA's) draft exploitation regulations. The ISA is the central body globally, created by UNCLOS, to oversee deep seabed mining and develop the corresponding legal regime.

### *Seabed Mining, Identity, and Participation*

Framing deep seabed mining as affecting, or being part of, traditional knowledge or intangible heritage has significant effects. First, it triggers different legal regimes, which contain specific norms requiring participation of Indigenous peoples and local communities. Second, the framing as intangible heritage also ties deep seabed mining to identity, with the consequence that considerations other than economics and the politics of development also become central to the question of whether to exploit these minerals, and how, arguably lending weight to identity issues in any balancing of competing interests. Third, as part of this type of balancing, we return to the need for participation in the design and implementation of deep seabed mining regimes.

I treat participation, normatively, as a pathway to fairness in the design and implementation of legal regimes. States are not the right—or at least certainly not the only—proxies for humankind, nor are economic interests; Indigenous peoples and local communities, as those most affected by seabed mining, offer valuable views of what one must consider in assessing fairness in this context. Their participation, however, must be part of regime design,

<sup>8</sup> [ICHC](#), *supra* note 1, Art. 15.

<sup>9</sup> [Ethical Principles](#), *supra* note 7, Principle 4 (emphasis in the original).

<sup>10</sup> [Agreement Under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction](#), UN Doc. A/77/L.82 (July 10, 2023).

not just implementation. As I show in this section, intangible heritage and its legal regime impose different considerations and requirements at each phase of the deep seabed mining process: (1) negotiating regulations (policy level); (2) assessing individual mining applications, including impact assessments; and (3) the actual mining. At each step, we must account for the views of the community most affected by mining.

Led by Pacific nations such as the Federated States of Micronesia,<sup>11</sup> there is broad support for the protection of cultural heritage in relation to deep seabed mining operations.<sup>12</sup> Intangible heritage, as I suggested above, presents much more potential for a fruitful conversation about the role of culture in deep seabed mining. Framing cultural considerations around intangible heritage is more in line with other provisions on heritage in the draft seabed mining regulations, like those on cultural considerations in considering mining applications, on the rejection of mining applications on the basis of negative impact on areas of cultural significance, the inclusion of cultural assessments in environmental impact assessments, and others.<sup>13</sup>

For negotiations at the policy level, the existence of living heritage can shore up arguments for control over what happens in large swathes of the ocean. It can open up productive avenues for conversation on both the “whether” and the “how” questions, in ways that decolonize knowledge and science, and allow for greater input from those most likely to be adversely affected by deep seabed mining, therefore safeguarding their interests on the basis of their cultures and epistemologies.<sup>14</sup> The ISA is the body that controls the Area for the benefit of humankind. Any balancing of interests needs to account for the impact of an action on identity, and here the ISA needs to bring Indigenous peoples and local communities to the table to participate meaningfully.

For assessments of applications, heritage can work as a lever for cultural impact assessments.<sup>15</sup> Making a clear link between cultural heritage and impact assessments involves tracing the effect of mining on intangible heritage. In this sense, intangible cultural heritage that has been officially listed as such (whether on national or international lists) stands a stronger chance of affecting cultural impact assessments.

Likewise, because the definition of intangible heritage is that which gives communities a sense of identity, there is a strong element of self-identification of knowledge. Communities identify the culture that gives them a sense of identity and continuity, which creates a stake for them in any activity that would negatively impact that cultural practice. These factors may often align with calls from many Pacific nations, as well as Indigenous peoples more broadly, for a moratorium on deep seabed mining. These calls also benefit from the support of international environmental movements.<sup>16</sup>

The support of environmental movements, however welcome, must not be weaponized against Indigenous peoples and their identities (or vice-versa), as it has happened in other contexts.<sup>17</sup> In other words, to the extent Indigenous and environmental interests may diverge, due consideration must always be given to Indigenous views.

<sup>11</sup> Federated States of Micronesia, Comments on the Draft Regulations of the International Seabed Authority on the Exploitation of Mineral Resources in the Area (14 October 2019), in [Compilation of the Proposals and Observations Sent by Other Member States of ISA, Observers and Stakeholders on the Draft Regulations in Response to Paragraphs 7 and 8 of ISBA/25/C/37](#) [hereinafter Compilation].

<sup>12</sup> Attachment to Australia’s Submission, in *id.*

<sup>13</sup> [Draft Regulations on Exploitation of Mineral Resources in the Area](#), Draft Regs. 13, 15(2)(b)(v), 47(2)(c) et seq., ISBA/28/C/CRP.4 (Oct. 19, 2023) [hereinafter Draft Regulations].

<sup>14</sup> Virginie Tilot et al., *Traditional and Socio-ecological Dimensions of Seabed Resource Management and Applicable Legal Frameworks in the Pacific Island States*, in [PERSPECTIVES ON DEEP SEABED MINING: SUSTAINABILITY, TECHNOLOGY, ENVIRONMENTAL POLICY AND MANAGEMENT](#) (Rahul Sharma ed., 2022).

<sup>15</sup> IUCN Comments on the 2019 ISA Draft Regulations on Exploitation of Mineral Resources in the Area ISBA/25/C/WP.1 (Mar. 22, 2019), in [Compilation](#), *supra* note 11.

<sup>16</sup> Anthony Kung et al., *Governing Deep Sea Mining in the Face of Uncertainty*, 279 J. ENVTL. MGMT. 1, 2 (2021).

<sup>17</sup> Michael Fakhri, *Markets, Sovereignty, and Racialization*, 25 J. INT’L ECON. L. 242 (2022).

It is important to rely not only on the expertise of the United Nations Educational, Scientific and Cultural Organization (UNESCO) on cultural heritage, as the current draft regulations suggest, but also to make room for forms of direct Indigenous expertise, which can be accessed through platforms like the United Nations Expert Mechanism on the Rights of Indigenous Peoples, a body of experts that includes in its ranks Indigenous members.<sup>18</sup>

At the time of writing, the ISA's draft exploitation regulations contain one central provision affecting the conduct of mining operations, which is mostly concerned with underwater cultural heritage.<sup>19</sup> Draft Regulation 35 requires that contractors notify the ISA secretary-general of any finds of underwater archaeology or human remains. The secretary-general then notifies affected states, if known, and UNESCO. The latter can provide expert advice on the existence and management of underwater heritage. The heritage is then to “be disposed of for the benefit of mankind as a whole or preserved, so that no further Exploration or Exploitation shall take place, within a reasonable radius.” In other words, heritage works to stop exploitation. It is worth noting that this provision, even though it speaks to underwater heritage, in fact ties to intangible values associated with that heritage.<sup>20</sup>

This provision has been the object of some (albeit not extensive) debate in deep seabed mining negotiations. Some of the debate, introduced by countries like China<sup>21</sup> and Poland,<sup>22</sup> is about the possibility of compensation for states that lose exploitation rights on the basis of culture (so far rejected in the draft). Other participants, like the United States, query whether UNESCO is the right authority for this type of work.<sup>23</sup>

### *Concluding Remarks*

Cultural heritage, particularly intangible cultural heritage, can work to center Indigenous and local knowledges and rights in relation to the ocean. There are legal obligations to take cultural heritage law—particularly in relation to intangible heritage—seriously, and negotiators must consider for the design, interpretation, and management of a deep seabed mining regime. These obligations work as a means to foreground Indigenous peoples' and local communities' concerns in this area. To take these obligations seriously is not just a matter of legal compliance; it will also create a fairer regime for all those involved, one that protects those upon whom deep seabed mining is likely to have the most deleterious effects, in addition to holding the promise to reconfigure power relations in the law of the sea.

<sup>18</sup> United Nations Office of the High Commissioner for Human Rights, *Expert Mechanism on the Rights of Indigenous Peoples*.

<sup>19</sup> *Kung et al.*, *supra* note 16, at 8.

<sup>20</sup> *Draft Regulations*, *supra* note 13, Draft Reg. 35.

<sup>21</sup> Comments by the Government of the People's Republic of China on the Draft Regulations on Exploitation of Mineral Resources in the Area (Oct. 15, 2019), in *Compilation*, *supra* note 11.

<sup>22</sup> Polish Remarks Regarding Draft Regulations on Exploitation of Mineral Resources in the Area, in *Compilation*, *supra* note 11.

<sup>23</sup> United States Comments (Oct. 2019), in *Compilation*, *supra* note 11.