

The marine manifestations of intangible cultural heritage

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Abstract

A number of elements of the intangible cultural heritage inscribed on the lists of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage are linked to activities relating to seas and oceans, such as navigation, fishing or disaster prevention. The 2023 Agreement on the Conservation and Use of Marine Biological Diversity of Areas beyond National Jurisdiction and the 2024 Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge protect traditional knowledge of indigenous peoples or local communities associated with genetic resources. As regards the exploitation of the mineral resources beyond the limits of national jurisdiction, a potential conflict can be envisaged between the principle of protection of intangible cultural heritage, on the one hand, and the principle of common heritage of mankind, on the other.

Keywords: Intangible cultural heritage, UNESCO, marine activities, law of the sea, human rights.

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1. The intangible cultural heritage and human rights

In 2003, the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted in Paris the Convention for the Safeguarding of the Intangible Cultural Heritage (hereinafter, ‘Conv. Int.’).¹ This treaty, which binds today the notable number of 183 States, recalls in the preamble “existing international human rights instruments”, namely the Universal Declaration of Human Rights (1948),² the International Covenant on Economic, Social and Cultural Rights (New York, 1966),³ and the International Covenant on Civil and Political Rights (New York, 1966).⁴

The intangible cultural heritage is a sign of cultural diversity, which “can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions,

1. See Janet Blake, *Commentary on the UNESCO 2003 Convention on the Safeguarding of the Intangible Cultural Heritage* (Institute of Art and Law 2006); Toshiyuki Kono (ed.), *Intangible Cultural Heritage and Intellectual Property: Communities, Cultural Diversity and Sustainable Development* (Intersentia 2009); Lucas Lixinski, *Intangible Cultural Heritage in International Law* (OUP 2013); Pier Luigi Petrillo (ed.), *The Legal Protection of the Intangible Cultural Heritage – A Comparative Perspective* (Springer 2019); Lucas Lixinski and Janet Blake (eds.), *The 2003 UNESCO Intangible Heritage Convention - A Commentary* (OUP 2020); Benedetta Ubertazzi, *Intangible Cultural Heritage, Sustainable Development and Intellectual Property* (Springer 2022).

2. Particularly relevant is Article 27(1): “Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts, and to share in scientific advancement and its benefits”.

3. Particularly relevant is Article 15(1): “The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (...)”.

4. Particularly relevant is Article 27(1): “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language”.

are guaranteed”.⁵ This implies the recognition of equal dignity of, and respect for, all cultures, including the cultures of persons belonging to minorities or indigenous peoples.⁶

The intangible cultural heritage presents a strong social character. A practice cannot be dissociated from a community of practitioners, as it is reflected in the definition itself of intangible cultural heritage, which means “the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage...”.⁷

An important consequence of its strong social character is that the “intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity...”.⁸

Among the ‘manifestations’ of intangible cultural heritage, the Conv. Int. includes:

5. See Article 2(1) of the Convention on the Protection and Promotion of the Diversity of Cultural Expression (Paris, 2005). According to Article 4 of the Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Faro, 2005), “the Parties recognise that: a) everyone, alone or collectively, has the right to benefit from the cultural heritage and to contribute towards its enrichment; b) everyone, alone or collectively, has the responsibility to respect the cultural heritage of others as much as their own heritage, and consequently the common heritage of Europe; c) exercise of the right to cultural heritage may be subject only to those restrictions which are necessary in a democratic society for the protection of the public interest and the rights and freedoms of others”.

6. See Article 2(3) of the Convention on the Protection and Promotion of the Diversity of Cultural Expression.

7. Conv. Int., Article 2(1). See Tullio Scovazzi, ‘Intangible Cultural Heritage as Defined in the 2003 UNESCO Convention’, in Gaetano Golinelli (ed.), *Cultural Heritage and Value Creation – Towards New Pathways* (Springer 2014) 105.

8. Conv. Int., Article 2(1).

- (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
- (b) performing arts;
- (c) social practices, rituals and festive events;
- (d) knowledge and practices concerning nature and the universe;
- (e) traditional craftsmanship.⁹

Not surprisingly, the Conv. Int. also provides that “[f]or the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.”¹⁰

Traditional practices that entail the depletion of a given species (for example, whaling) or cruelty towards animals (for example, sealing) could be considered as incompatible with the principle of sustainable development or with international human rights instruments and, consequently, as not covered by the Conv. Int.

As stated in the preamble of the Conv. Int., the present processes of globalisation and social transformation, as well as recurring phenomena of intolerance, can give rise to grave threats of deterioration, disappearance and destruction of the intangible cultural heritage, in particular owing to a lack of resources for the safeguarding of it. The Conv. Int. aims, among other things, at ensuring respect for the intangible cultural heritage of the communities, groups and individuals concerned, raising awareness at the local, national and international levels of the importance of such heritage and ensuring mutual appreciation thereof.¹¹

Like the Convention concerning the Protection of the World Cultural

9. Ibid., Article 2(2).

10. Ibid., Article 2(1).

11. Ibid., Article 1(b) and (c).

and Natural Heritage (Paris, 1972),¹² the Conv. Int. provides for the establishment of two lists, namely the Representative List of the Intangible Cultural Heritage of Humanity (hereinafter, the ‘Representative List’), and the List of Intangible Cultural Heritage in Need of Urgent Safeguarding (hereinafter, the ‘Safeguarding List’), drawn up by the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage (hereinafter, the ‘Committee’).¹³ In fact, the lists become three if account is taken also of the Register of Good Safeguarding Practices (hereinafter, the ‘Good Practices Register’), intended to include the national, subregional and regional programmes, projects and activities that best reflect the principles and objectives of the Conv. Int.¹⁴

The social character of intangible heritage explains why the elements on the lists established under the Conv. Int. are not selected because of their “outstanding universal value”, as instead required for inscription on the lists drawn up under the abovementioned 1972 World Heritage Convention.¹⁵ In the case of the intangible cultural heritage, it is sufficient that the elements are “representative of the intangible cultural heritage of humanity”. Here the lists are inclusive rather than exclusive. They are drawn “to ensure better visibility of the intangible cultural heritage and awareness of its significance”,¹⁶ without establishing any hierarchy between different communities. Such a hierarchy would be contrary to the objectives of encouraging “dialogue which respects cultural diversity”¹⁷ and of “bringing human beings closer together and ensuring ex-

12. On this Convention see Francesco Francioni and Federico Lenzerini (eds.), *The 1972 World Heritage Convention: A Commentary* (OUP 2023).

13. It is composed of 24 States parties elected for a term of four years.

14. See Article 18 of the Conv. Int.

15. Namely, the World Heritage List and the List of World Heritage in Danger.

16. Conv. Int., Article 16(1).

17. Ibid.

change and understanding among them”.¹⁸

So far, the elements inscribed in the lists are 730, of which 611 are in the Representative List, 82 are in the Safeguarding List and 37 are in the Good Practices Register. It could be interesting to see which elements so far inscribed on the Conv. Int. lists present a marine connotation and to which kind of activities they are related.

2. Instances of marine activities listed under the Conv. Int.

2.1 Navigation and wayfinding

Navigation, in the form of ship or boat building, is the marine activity most represented in the Conv. Int. lists. In certain cases, it is combined with wayfinding capacities.

In 2017, the Committee decided to inscribe the element “Pinisi, art of boatbuilding in South Sulawesi” (Indonesia)¹⁹ on the Representative List based on the following considerations:

Pinisi, or the Art of Boatbuilding in South Sulawesi, refers to the rig and sail of the famed ‘Sulawesi schooner’. The construction and deployment of such vessels stand in the millennia-long tradition of Austronesian boatbuilding and navigation that has brought forth a broad variety of sophisticated watercrafts. For both the Indonesian and the international public, Pinisi has become the epitome of the Archipelago’s indigenous sailing craft. Today, the centres of boatbuilding are located at Tana Beru, Bira and Batu Licin, where about 70 per cent of the population make a living through work related to boatbuilding and navigation. Shipbuild-

18. Ibid., Preamble.

19. Indonesia is the biggest archipelagic State in the world.

ing and sailing are not only the communities' economic mainstay, however, but also the central focus of daily life and identity. The reciprocal cooperation between the communities of shipwrights and their relations with their customers strengthen mutual understanding between the parties involved. Knowledge and skills related to the element are passed down from generation to generation within the family circle, as well as to individuals outside of the family through the division of labour. The communities, groups and individuals concerned are actively involved in safeguarding efforts, for example through marketing initiatives and the publication of books on the subject.²⁰

In 2021, the pluri-national element "Nordic clinker boat traditions" (Denmark, Finland, Iceland, Norway and Sweden) was inscribed on the Representative List based on the following considerations:

Nordic clinker boats are small, open, wooden boats between five and ten metres long. For almost two millennia, the people of the Nordic region (including the indigenous Sami peoples in Finland, Norway and Sweden and minority groups such as the Kvens in Norway, the Tornedalians in Sweden and the Swedish-speaking population in Finland) have been building clinker boats using the same basic techniques: thin planks are fastened to a backbone of the keel and stems, and the overlapping planks are fastened together with metal rivets, treenails or rope. The shell of the boat is strengthened with frames. Clinker boat builders emphasize the long time it takes to acquire the knowledge and skills for building traditional boats. In the past, it was common to start training with a master from a young age, and it would take up to ten years to learn the trade. A symbol of common Nordic coastal heritage, clinker boats were traditionally used for fishing and to transport materials and people. Today, they are primarily used in traditional festivities, regattas and sporting events, even though about a thousand persons make a full or partial living through the production, maintenance or use of clinker boats. Clinker boat traditions include social practices. For instance, once finished, boats may be ceremo-

20. Decision 12.COM 11.b.13.

nially carried to the water where they are then given a name and wished good fortune; traditional songs may be sung during sailing and rowing.²¹

In certain cases, the elements need safeguarding measures.²² In 2010, the Committee decided to inscribe the element “Watertight-bulkhead technology of Chinese junks” (China) on the Safeguarding List:

Developed in South China’s Fujian Province, the watertight-bulkhead technology of Chinese junks permits the construction of ocean-going vessels with watertight compartments. If one or two cabins are accidentally damaged in the course of navigation, seawater will not flood the other cabins and the vessel will remain afloat. The junks are made mainly of camphor, pine and fir timber, and assembled through use of traditional carpenters’ tools. They are built by applying the key technologies of rabbit-jointing planks together and caulking the seams between the planks with ramie, lime and tung oil. The construction is directed by a master craftsman who oversees a large number of craftsmen, working in close coordination. Local communities participate by holding solemn ceremonies to pray for peace and safety during construction and before the launch of the completed vessel. The experience and working methods of watertight-bulkhead technology are transmitted orally from master to apprentices. However, the need for Chinese junks has decreased sharply as wooden vessels are replaced by steel-hulled ships, and today only three masters can claim full command of this technology. Associated building costs have also increased owing to a shortage in raw materials. As a result, transmission of this heritage is decreasing and transmitters are forced to seek alternative employment.²³

21. Decision 16.COM 8.b.10.

22. “‘Safeguarding’ means measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage” (Conv. Int., Article 2(3)).

23. Decision 5.COM 5.2. Moreover, “despite the historical importance of this shipbuilding technology, its continuity and viability are today at great risk because wooden ships are replaced by steel-hulled vessels, while the timber for their construction is in increasingly short supply; apprentices are reluctant to devote the time necessary to master the trade and craftspeople have not managed to find supplementary uses for their carpentry skills”.

In 2011, the Committee decided to inscribe the element “Traditional skills of building and sailing Iranian Lenj boats in the Persian Gulf” (Iran) on the Safeguarding List. The relevant considerations show how manifestations of intangible cultural heritage are in danger today of being replaced by the products of new technologies and how traditional maritime navigation was often associated with wayfinding skills:

Iranian Lenj vessels are traditionally hand-built and are used by inhabitants of the northern coast of the Persian Gulf for sea journeys, trading, fishing and pearl diving. The traditional knowledge surrounding Lenjes includes oral literature, performing arts and festivals, in addition to the sailing and navigation techniques and terminology and weather forecasting that are closely associated with sailing, and the skills of wooden boat-building itself. The navigational knowledge used to sail Lenjes was traditionally passed on from father to son. Iranian navigators could locate the ship according to the positions of the sun, moon and stars; they used special formulae to calculate latitudes and longitudes, as well as water depth. Each wind was given a name, which along with the colour of water or the height of waves was used to help forecast the weather. Specific music and rhythms also constituted inseparable parts of sailing in the Persian Gulf, with sailors singing particular songs while working. Nowadays, the community of practitioners is small and mainly comprises older people. Wooden Lenjes are being replaced by cheaper fibreglass substitutes, and wooden Lenj construction workshops are being transformed into repair shops for older Lenjes. The philosophy, ritualistic background, culture and traditional knowledge of sailing in the Persian Gulf are gradually fading, although some of the associated ceremonies continue to be practised in a few places.²⁴

24. Decision 6.COM 8.10. Moreover, “the diminishing number of practitioners, economic changes, adoption of cheaper manufacturing technologies, and introduction of modern navigation methods combine to threaten the viability of the element; knowledge of it is compartmentalized among different groups, who are not aware of the philosophy, ritual background and complete form of the tradition”.

Boatbuilding is strictly connected to long-distance orientation also in the case of the element “Carolinian wayfinding and canoe making” (Micronesia) that in 2021 was inscribed on the Safeguarding List:

Carolinian wayfinding and canoe making refers to the centuries-old tradition of building and navigating long-distance canoes. Communities in Micronesia, and particularly in the outer islands of Yap State, continue the traditions of building the ocean-voyaging sailing canoes from local materials and of navigating, or wayfinding, without maps or instruments. The entire community participates in the construction of the canoe, which begins with the selection and felling of a tree and involves a detailed measurement system based on an indigenous mathematical tradition that is both accurate and verifiable. The carving is done almost exclusively with the indigenous adze. The asymmetrical design supports high-speed sailing and allows access to shallow water. Traditional wayfinders use environmental cues, including atmospheric phenomena, to navigate. Although they have been lost in most Pacific nations, these wayfinding and canoe-making traditions and technologies enabled the settlement of thousands of islands in the Pacific Ocean. The practice is passed on through traditional apprenticeships led by master canoe carvers and navigators. Today, only a limited number of navigators and canoe carvers remain, with few opportunities to pass on the knowledge and skills due to the reduced size of nuclear families and migration to high islands. The element is also threatened by faster transportation alternatives and environmental degradation.²⁵

25. Decision 16.COM 8.a.4. Moreover, “faster transportation, environmental degradation, pressure on subsistence living and the limited availability of the wood needed to make the canoes are some of the threats to the continued viability of the element”.

Initiatives to preserve traditional types of boats have taken place. In 2016, the Committee selected “Oselvar boat – Reframing a traditional learning process of building and use to a modern context” (Norway) for inclusion in the Good Practices Register:

Previously western Norway’s main mode of transportation, also used for recreation, the wooden oselvar boat almost became obsolete with the introduction of modern boats in the 1940s, as well as government price restrictions forcing builders to find alternative work, and greater road transport in the 1960s. To help safeguard the traditional practice, the Os Båtbyggjarlag boat-builders guild, Os Municipality and Hordaland County, supported by the Arts Council Norway, founded the non-profit boatyard and workshop foundation Oselvarverkstaden. Operating since 1997, it recruits apprentice boat builders, facilitates the transmission of expert know-how on building techniques (normally passed down from father to son), attracts active builders providing them with infrastructure and supports the oselvar manufacturing market. So far, more than 85 boats have been built and 40 repaired. Five of its six apprentices remain active and four builders participate. They have access to a workshop where skills sharing is encouraged, as well as materials and tools. Constructing the 5m to 10m boats made for racing, freighting or fishing is a 500 to 600 hour process, from negotiating with material suppliers to rigging and testing the final product. The builders also conduct field studies, demonstrations and participate in seminars and exhibitions, locally and internationally.²⁶

Another similar instance is “The Martinique yole, from construction to sailing practices, a model for heritage safeguarding” (France), which in 2020 was selected for the Good Practices Register:

26. Decision 11.COM 10.c.7.

Created several centuries ago, the Martinique yole reflects the importance of traditional boats in the history of the region. A yole is a light, fast, shallow-draught boat with a tapered shape, which can sail with one or two sails. Crew members must perch off the hull on long movable poles to balance the boat, requiring great agility, physical engagement and perfect coordination. Yoles are built in different shapes depending on their uses and the geographical areas concerned; the Martinique yole used by fishers is ideal for the specific conditions along the island's coasts. During the 1950s and 1960s, other types of boats made of composites and equipped with motors gradually supplanted the traditional yole. Faced with the threat of disappearance of these boats, which reflected the history and society of the island, a spontaneous movement to safeguard them developed. The safeguarding initiatives originated with races organized by the fishers themselves. Over the years, the safeguarding programme has gradually expanded, and is now supported by a broad range of longstanding associations and partnerships. This has resulted in a number of good practices. The main objectives of the safeguarding programme are to: preserve the know-how of local boat builders; transmit know-how on sailing; strengthen the ties between yole practitioners and the local community; and create a federation capable of organizing major events.²⁷

2.2 Fishing

Three traditional fishing techniques have been selected by the Committee for the Representative List.

In 2016, the Committee decided to inscribe the element “Culture of Jeju Haenyeo (women divers)” (Republic of Korea):

In Jeju Island, there is a community of women, some aged in their 80s, which goes diving 10m under the sea to gather shellfish, such as abalone or sea urchins for a living without the help of oxygen masks. With

27. Decision 15.COM 8.c.2.

knowledge of the sea and marine life, the Jeju haenyeo (female divers) harvest for up to seven hours a day, 90 days of the year holding their breath for just one minute for every dive and making a unique verbal sound when resurfacing. Divers are categorised into three groups according to level of experience: hagin, junggun and sanggun with the sanggun offering guidance to the others. Before a dive, prayers are said to the Jamsugut, goddess of the sea, to ask for safety and an abundant catch. Knowledge is passed down to younger generations in families, schools, local fishery cooperatives which have the area's fishing rights, haenyeo associations, The Haenyeo School and Haenyeo Museum. Designated by the provincial government as representing the island's character and people's spirit, the culture of Jeju haenyeo has also contributed to the advancement of women's status in the community and promoted environmental sustainability with its eco-friendly methods and community involvement in management of fishing practices.²⁸

The element "Charfia fishing in the Kerkennah Islands" (Tunisia), which in 2020 was inscribed on the Representative List, can be considered a sustainable way of fishing:

Charfia fishing in the Kerkennah Islands is a traditional, passive fishing technique that capitalises on the hydrographic conditions, seabed contours and natural resources both at sea and on land. The 'charfia' is a fixed fishery system consisting of palm fronds embedded in the seabed to create a triangular barrier, blocking the path of the fish pulled in by the ebb tide and channelling them into capture chambers and finally into a net or trap. Unlike bottom trawling systems that scrape the seabed, the traps keep the fish alive and fasting until raised. It is customary to install and operate the charfia only between the autumn equinox and June to ensure the marine wildlife have a biological rest period. The charfias are rebuilt each year, accompanied by social practices such as sharing a meal or rogatory prayers. The practice of charfia fishing requires extensive knowledge of underwater topography and marine currents. Many

28. Decision 11.COM 10.b.24.

of the inhabitants of Kerkennah learn to fish from an early age and it is also common for a rāïs to leave his fishery to his eldest son to perpetuate ownership. Vocational training centres also provide indirect training. Charfia fishing is the main fishing technique used in the Kerkennah Islands. The entire local community participates in the different phases of the process in varying degrees, from installing the charfia and the accompanying rituals to raising the traps, making this a unifying element for all Kerkennians.²⁹

Even if they cannot be considered as marine mammals, horses can be useful for fishing, as shown by the element “Shrimp fishing on horseback in Oostduinkerke” (Belgium), inscribed in 2020:

Twelve households in Oostduinkerke are actively engaged in shrimp fishing: each has its own speciality, such as weaving nets or an extensive knowledge of Brabant draft horses. Twice a week, except in winter months, the strong Brabant horses walk breast-deep in the surf in Oostduinkerke, parallel to the coastline, pulling funnel-shaped nets held open by two wooden boards. A chain dragged over the sand creates vibrations, causing the shrimp to jump into the net. Shrimpers place the catch (which is later cooked and eaten) in baskets hanging at the horses’ sides. A good knowledge of the sea and the sand strip, coupled with a high level of trust and respect for one’s horse, are the shrimpers’ essential attributes. The tradition gives the community a strong sense of collective identity and plays a central role in social and cultural events, including the two-day Shrimp Festival for which the local community spends months building floats, preparing street theatre and making costumes. The shrimp parade, and a contest involving hundreds of children being initiated into shrimp catching, attract over 10,000 visitors every year. The shrimp fishers function on principles of shared cultural values and mutual dependence. Experienced shrimpers demonstrate techniques and share their knowledge of nets, tides and currents with beginners.³⁰

29. Decision 15.COM 8.b.9.

30. Decision 8.COM 8.5.

2.3 Disaster prevention

The worshipping of deities to prevent casualties at sea is a practice that can also qualify for the Conv. Int. In 2020, the Committee decided to inscribe on the Representative List the element “Ong Chun / Wangchuan / Wangkang ceremony, rituals and related practices for maintaining the sustainable connection between man and the ocean” (China and Malaysia):

The Ong Chun ceremony and related practices are rooted in folk customs of worshipping Ong Yah, a deity believed to protect people and their lands from disasters. Developed in China’s Minnan region between the fifteenth and seventeenth centuries, the element is now centered in the coastal areas of Xiamen Bay and Quanzhou Bay, as well as in the Chinese communities in Melaka, Malaysia. Those who died at sea are considered as ‘good brothers’ who become lonely, wandering souls. The ceremony begins by people gathering at the seaside to welcome Ong Yah to temples or clan halls, while lamp poles are erected to summon ‘good brothers’ and deliver them from torment. In this way, the element has been celebrated as ‘doing good deeds’. Performances head the procession and clear a path for Ong Yah’s barge (wooden or paper-made models). These performances include gaojia and gezai opera, different dances, comprising dragon and lion dances, and puppet shows, among many others. The element evokes the historical memory of ancestors’ ocean-going, reshapes social connections when confronted with emergencies such as shipwrecks, and honours the harmony between man and the ocean. It also bears witness to the intercultural dialogue among communities.³¹

31. Decision 15.COM 8.b.22.

3. Intangible cultural heritage on the high seas

While most of the manifestations of intangible cultural heritage take place in coastal waters,³² it is not excluded that some elements may occur also on the high seas, that is beyond the 200-mile limit of the exclusive economic zone. This assumption is confirmed by some of the elements already included in the Conv. Int. lists, such as those relating to wayfinding capacities.³³

No provision in the United Nations Convention on the Law of the Sea (Montego Bay, 1982) does directly refer to the traditional knowledge of certain communities.³⁴ However, the recently adopted 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 (New York, 2023) includes a provision devoted to “traditional knowledge of Indigenous Peoples and local communities associated with marine genetic resources in areas beyond national jurisdiction”:

Parties shall take legislative, administrative or policy measures, where relevant and as appropriate, with the aim of ensuring that traditional knowledge associated with marine genetic resources in areas beyond national jurisdiction that is held by Indigenous Peoples and local communities shall only be accessed with the free, prior and informed consent or approval and involvement of these Indigenous Peoples and local communities. Access to such traditional knowledge may be facilitated by

32. For the simple reason that human permanent settlements take place on land or, in some rare cases, close to land.

33. *Supra*, 2.1.

34. However, an indirect reference to, *inter alia*, traditional practices may be found in Article 7(5): “Where the method of straight baselines is applicable under paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage”.

the Clearing-House Mechanism. Access to and use of such traditional knowledge shall be on mutually agreed terms.³⁵

As stated by the Pacific Small Island Developing States, the recognition of traditional knowledge of Indigenous Peoples and local communities and their rights thereto moves the needle towards equity and towards a healthy, productive and resilient ocean to which the international community has long committed:

The Pacific have long advocated for traditional knowledge of Indigenous Peoples and local communities to be recognized as a source of knowledge which, with proper safeguards, could inform the decision-making processes under this Agreement.

Indigenous Peoples have a wealth of knowledge based on millennia of observing and interacting with the natural earth and we are pleased to see the recognition of this traditional knowledge clearly indicated alongside the best available science and scientific information.³⁶

The delegate of Micronesia confirmed that:

We have broken ground on a number of important issues, with far-reaching legal implications, such as for: [...] the relevance of the traditional knowledge of Indigenous Peoples and local communities as sources of information for the Agreement on par with science, and the rights of such Indigenous Peoples and local communities including their free, prior, and informed consent.³⁷

35. Article 13. In the preamble of the Agreement, the parties affirm that nothing in it “shall be construed as diminishing or extinguishing the existing rights of Indigenous Peoples, including as set out in the United Nations Declaration on the Rights of Indigenous Peoples, or of, as appropriate, local communities”.

36. United Nations doc. A/CONF.232/2023/INF.5 of 3 August 2023, 17.

37. *Ibid.*, 69.

Within the World Intellectual Property Organization (WIPO), after long-lasting negotiations, the Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge was adopted in Geneva on 24 May 2024. It emphasises the need “to prevent patents from being granted erroneously for inventions that are not novel or inventive with regard to genetic resources and traditional knowledge associated with genetic resources”.³⁸ The treaty, which applies both on land and at sea, binds parties to require applicants to disclose in a patent application based on genetic resources the country or origin or the source of such resources,³⁹ as well as the indigenous peoples or local community who provided the traditional knowledge associated with genetic resources.⁴⁰ Where there has been fraudulent intent in regard to the disclosure requirements, parties are bound to provide for post-grant sanctions or remedies.⁴¹ However, the treaty does not cover the whole range of inventions related to intangible cultural heritage, but only those inventions that depend on the specific properties of genetic resources or the traditional knowledge associated with genetic resources.

Within the International Seabed Authority and during the ongoing work for the drafting of the Regulations on Exploitation of Mineral Resources in the Area,⁴² it was proposed to understand the concept of “underwater cultural heritage” as including both the “tangible underwater cultural heritage” and the “intangible underwater cultural heritage”. The

38. Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge, Preamble and Article 1(b).

39. *Ibid.*, Article 3(1).

40. *Ibid.*, Article 3(2).

41. *Ibid.*, Article 5(4).

42. The Area is defined in the United Nations Convention on the Law of the Sea as “the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction” (Article 1, para 1), that is beyond the limits of the 200-mile exclusive economic zones established by coastal States.

latter was defined in the schedule (use of terms) of the draft as referring to:

[P]ractices, representations, expressions, knowledge, skills, and traditions that are transmitted from generation to generation – as expressed in instruments, objects, artefacts, flora, fauna and cultural spaces associated therewith – that communities, groups, or, in some cases, individuals recognize as part of their cultural heritage; and relate to the underwater environment and to its interaction with human cultures. This may include, but is not limited to, traditional navigation knowledge, oral histories associated with maritime landscapes, spiritual and ritual practices linked to water bodies, and artisanal fishing techniques.⁴³

The regulations are still in the drafting process and little can be said about their final content.⁴⁴ However, they are likely to include a provision according to which exploitation activities in the Area are to be conducted in a way that does not affect underwater cultural heritage and, perhaps, a provision prescribing the termination of activities within a clearly defined area surrounding a discovered underwater cultural heritage.⁴⁵

Given the very broad range of certain manifestations of intangible cultural heritage that take place in the oceans, it will be interesting to see how the forthcoming Regulations are able to balance two potentially conflicting general principles in present international law: the principle of protection of the cultural heritage,⁴⁶ on the one hand, and the prin-

43. Doc. ISBA/29/C/CRP. 1 of 16 February 2024.

44. See Matteo Bedendi and Lorenzo Schiano di Pepe, 'A New Chapter of Ocean Governance and the European Union: Codification Efforts and Prospects of a Moratorium at the International Seabed Authority' (2025) *International Journal of Marine and Coastal Law*, 1-20, 1.

45. See draft Regulation 35alt.

46. See Francesco Francioni, 'A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage', in Abdulqawi A. Yusuf (ed.), *Standard-setting in UNESCO, volume I: normative action in education, science and culture; essays in commemoration of the Sixtieth Anniversary of UNESCO* (UNESCO 2007) 221.

ciple of common heritage of mankind, on the other.⁴⁷ In fact, the latter goes in the direction of promoting as much as possible the exploitation of mineral resources of the Area for the benefit of mankind as a whole, taking into particular consideration the interests and needs of developing States, as provided for in Article 140 of the United Nations Convention on the Law of the Sea.

4. Conclusions

In present international law, the intangible cultural has emerged as a component of the broader concept of cultural heritage. It is duly protected by the 2003 specific convention concluded within the framework of UNESCO to which the great majority of States are parties today.

Besides this convention, two recent treaties take into consideration the intangible cultural heritage. The 2024 WIPO treaty on intellectual property and genetic resources aims at protecting indigenous peoples or local communities that have provided traditional knowledge associated with genetic resources, and the 2023 Agreement on biodiversity of areas beyond national jurisdiction aims at ensuring that traditional knowledge associated with marine genetic resources held by indigenous peoples or local communities is accessed only with their free, prior and informed consent. Moreover, during the negotiations for the drafting of the regulations on the exploitation of mineral resources in the Area, a potential conflict is emerging between the principle of protection of the cultural heritage and the principle of common heritage of mankind.

47. See Tullio Scovazzi, 'The Principle of Common Heritage of Mankind in International Law of the Sea: Problems and Prospects', in Siew Moi Phang et al. (eds.), *Innovations and Technologies in Oceanography for Sustainable Development* (University of Malay – Maritime Research Centre 2005) 327.

The unavoidable, even if not fully satisfactory, conclusion is that the intangible cultural heritage is becoming an interesting subject matter even from the point of view of international law, irrespective of whether it is located on land or in the seas and oceans.