

The Ocean Foundation: Second ISA Underwater Cultural Heritage Intersessional Key Talking Points

1. Duty to Protect and to Cooperate for that Purpose under the Law of the Sea.....	1
2. Defining Underwater Cultural Heritage (UCH) using the precedent of UNESCO’s 2001 Convention on the Protection of Underwater Cultural Heritage.....	1
Options for the Mining Code’s Underwater Cultural Heritage Definitions.....	2
3. Integration of UCH into Baseline Surveys and EIAs prior to any licensing.....	2
4. Integration of Cultural and Natural in the Protection and Management of Heritage.....	3
5. Intangible Cultural Heritage.....	4
6. Contractor Expertise and UCH.....	4

1. Duty to Protect and to Cooperate for that Purpose under the Law of the Sea

Under the [1982 Law of the Sea Convention \(LOSC\)](#) Article 303 (1)

- **“ States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.”**

This duty that applies to our heritage in all maritime zones, including the Area under the high seas, which is also covered in article 149:

- **“All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.”**

Therefore, the members of the ISA have an obligation to address this duty in the regulations for deep seabed mining.

2. Defining Underwater Cultural Heritage (UCH) using the precedent of UNESCO’s 2001 Convention on the Protection of Underwater Cultural Heritage

The LOSC terms of “objects of an archaeological and historical nature” are vague and subject to debate. TOF recommends using the definition of “Underwater Cultural Heritage (UCH)” as found in the UNESCO 2001 Convention and consider using the term and acronym UCH hereinafter.

The use of text from other international agreements **is often helpful in harmonizing international law**. This offers clarity and precedent on how to classify objects of an archaeological and historical nature. A nation does not need to be a signatory too, or accept the substance of, the UNESCO agreements in order to use the definitions therein. Note also that

there **was a consensus on the definition of UCH under UNESCO** including by nations that are not signatories.

Options for the Mining Code's Underwater Cultural Heritage Definitions

The agreed [UNESCO 2001 Convention](#) Definition of UCH from Article 1.1(a):

“Underwater Cultural Heritage” means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously, for at least 100 years such as: (i) sites, structures, buildings, artifacts and human remains, together with their archaeological and natural context; (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and (iii) objects of prehistoric character.

Option 1:

“Objects of an archaeological and historical nature found in the Area” means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously, for at least 100 years such as: (i) sites, structures, buildings, artifacts and human remains, together with their archaeological and natural context; (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and (iii) objects of prehistoric character.

Option 2:

“Objects of an archaeological and historical nature found in the Area” means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously, for at least 100 years such as: (i) sites, structures, buildings, artifacts and human remains, together with their archaeological and natural context; (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and (iii) objects of prehistoric character hereinafter “Underwater Cultural Heritage (UCH).

3. Integration of UCH into Baseline Surveys and EIAs prior to any licensing

The baselines surveys of the marine environment must also include surveys of “objects of an archaeological and historical nature” or more simply and precisely UCH. These baseline surveys should provide the basis for the affected marine environment that is the subject of the environmental impact assessments to be required before the licensing and conduct of mining. In order for mining to truly be sustainable, the Ocean Science-based decision making must be based on EIAs and include the baseline survey information that identifies the **ocean heritage (natural and cultural) that members have a duty to protect under UNCLOS Articles 149, 303(1), and Part XII.**

There are precedents. For example, the [EU Directive on Environmental Impacts](#) amendments in 2014 refer to the need to assess the effects of projects on, among other things,

“**biodiversity... water...cultural heritage**, including architectural and **archaeological aspects....**” (Annex IV (Information for the Environmental Impact Assessment Report))

4. Integration of Cultural and Natural in the Protection and Management of Heritage

UCH and natural heritage are linked, both practically in the marine environment and in international conventions. UCH becomes an integral part of the marine environment, such as when UCH often acts as an artificial reef. So while there are distinct legal obligations to protect natural and cultural heritage it makes sense to integrate the legal obligations to protect them in the Environmental Impact Assessments.

Convention	Relevant Text or Provisions
1972 World Heritage Convention	The first international law recognising special places for the significance of ‘outstanding universal value’ of both natural and cultural heritage. Member states should “ take measures to protect their cultural and natural heritage against the possible harmful effects of the technological developments characteristic of modern civilization ”
UNESCO 2001 Convention	Article 10(2): links UCH and natural resources , providing state parties with a basis to take action to prevent activities directed at UCH from damaging natural resources.
European Convention on the Protection of the Archaeological Heritage, 1992	Notes that elements of archaeological heritage include remains and objects that help retrace “the history of mankind and its relation with the natural environment ” on land and underwater.
UN Convention on Biological Diversity 1992	Annex I notes that ecosystems and habitats include ones “of social, economic, cultural or scientific importance ”
The Barcelona Convention 1995	The Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona Convention) with the Mediterranean Action Plan (MAP), a regional seas program with a main objective is “ to protect the natural and cultural heritage ” and it advocates for sustainable development.

Marine Spatial Planning - Integrating UCH may be the best way to address the duties to Protect the Marine Environment and “objects of an archaeological and historical nature” This would be consistent with a Precautionary Approach as well as the recent agreement on Biodiversity Beyond National Jurisdiction.

5. Intangible Cultural Heritage

Intangible heritage must also be protected from harmful activities as disturbances to the deep sea has the potential to harm the relationships many communities have built with the ocean.

Seafaring peoples have traversed the Pacific for the last few thousand years.

- Movement from Polynesia to Hawaii was completed as early as 500 AD. Tangible evidence of these voyages is scant, so intangible heritage and history of these journeys are even more important– even sacred.
- Pacific methods of ‘wayfinding’ led to inter- and intra-island connections with the sea and coast being seen as a sacred and spiritual place.

Many Pacific Indigenous peoples hold a known intangible cultural and ancestral connection to the deep sea.

- In the Pacific, the sea is seen by some as both an ancestor itself, and as a resting place for ancestors.
- Many Pacific people also have a unique relationship with whales, and cetaceans will be affected by noise from DSM operations. In one specific example, noise from DSM has the potential to negatively impact local practices, such as shark calling, as well as the migration of whales– which have cultural importance to many people globally.
- Concerns have also been raised about DSM’s interactions with some cultures’ understanding of responsibility to the ocean or special regard for the deep ocean.

Acknowledgement and awareness of these conversations **have not found** a place in regulatory development at the ISA. Thus, the voices of some stakeholders are not being heard, including those of Indigenous Peoples, who have a right to opine on matters that affect their cultural practices and traditional knowledge. This intersessional as an outcome of the March 2023 ISA meetings is a step in the right direction to honor and acknowledge the cultural diversity of the planet.

International Precedents

[The Rio Declaration on Environment and Development 1992](#)

- Principle 22 states that Indigenous people and their communities and other local communities have a vital role in environmental management and development and States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

[UNESCO Intangible Cultural Heritage Convention 2003](#)

- “Considering the deep-seated interdependence between the intangible cultural heritage and the tangible cultural and natural heritage”

6. Contractor Expertise and UCH

It is very promising that there is a recognition here that we have an obligation to protect UCH, but the fact that contractors do not have the expertise in the area is no excuse to not include UCH in impact assessments. The Ocean Foundation stands by to discuss this with any parties.